Supreme Court, U.S.
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No. 01-OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION,

Petitioner,

v.

JOSEPH P. GRIESSER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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79 pp

QUESTIONS PRESENTED

1. Whether in a FELA action, where the jury is being asked to determine the period for which future lost wages and benefits should be awarded, the lower court erred when it concluded that the collateral source rule should be expanded to bar evidence that a railroad employee would be eligible to receive full retirement benefits at age 60, which evidence was offered to show that it was more likely that the employee would retire at 60 instead of 65 or 70?

2. Assuming that such evidence does constitute collateral source evidence, whether the lower court erred when it concluded that *Eichel v. New York Central Railroad Co.*, 375 U.S. 253 (1963) (per curiam), absolutely prohibits in a FELA case *any* balancing analysis to determine whether the probative value of the evidence outweighs any prejudicial impact?

PARTIES INVOLVED AND RULE 29.6 STATEMENT

All parties below are named in the caption. Petitioner National Railroad Passenger Corporation ("Amtrak") is a corporation providing intercity passenger rail service. Amtrak has no parent company. American Premiere Underwriters, Inc. and Burlington Northern Santa Fe Railroad Company own 10% or more of Amtrak's stock. Respondent, Joseph Griesser, was an employee of Amtrak.

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Petitioner Amtrak respectfully petitions this Court for a writ of certiorari to review a decision of the Superior Court of Pennsylvania.

OPINIONS BELOW

The opinion of the Court of Common Pleas of Philadelphia County denying respondent's motion for a new trial is unreported and is reproduced in the Appendix at 17a. The opinion of the Superior Court of Pennsylvania vacating the judgment of the trial court and remanding for a new trial is reported at 2000 Pa. Super. 1999, 761 A.2d 606 (2000), and is reproduced at 1a. The order of the Supreme Court of Pennsylvania denying Amtrak's petition for allowance of appeal is reported at 2001 WL 435436 (April 26, 2001), and is reproduced at 43a.

STATEMENT OF JURISDICTION

The judgment of the Superior Court of Pennsylvania was entered on October 19, 2000. The Supreme Court of Pennsylvania denied Amtrak's petition for allowance of appeal on April 26, 2001. This petition is timely filed within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

FEDERAL STATUTE INVOLVED

The Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, states in pertinent part:

> Every common carrier by railroad, while engaging in commerce between any of the several states . . . shall be liable in damages to any person

> suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . .

45 U.S.C. § 51.

STATEMENT OF THE CASE

A. Procedural History

On February 7, 1994, respondent Joseph Griesser, an Amtrak employee, was injured while working on a truck. Respondent brought an FELA action against Amtrak in the Court of Common Pleas of Philadelphia County. Respondent claimed that he suffered a permanent, disabling lower back condition as a result of the accident. Amtrak contended that his medical condition was not severe enough to prevent his return to work and that his back condition was not caused by the accident.

Following a five day trial, the jury found Amtrak and respondent each 50% negligent. They awarded damages of $419,500 consisting of $99,750 for past lost wages and benefits; $71,250 for future lost wages and benefits; $162,562 for past pain and suffering; and $85,938 for future pain and suffering. R. 617a-619a.[1] A judgment in favor of respondent was entered in the amount of $209,750, reflecting his 50% contributory negligence.

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1. Reference to "R. ___" are to the record before the Superior Court of Pennsylvania.

Respondent appealed to the Superior Court of Pennsylvania, which vacated the judgment and remanded for a new trial. The Superior Court concluded that the trial court had violated this Court's decision in *Eichel v. New York Central Railroad Co.*, 375 U.S. 253 (1963) (per curiam), when it allowed Amtrak to introduce evidence that respondent would have been eligible for retirement benefits at age 60, which Amtrak had used to rebut respondent's claim that he would have worked to age 65 or 70. Amtrak timely filed a petition for allowance of appeal to the Supreme Court of Pennsylvania, which was denied without comment on April 26, 2001.

B. The Evidence in Question

The issue on this petition arises from respondent's claim for future lost wages and benefits. Respondent, who was 45 years old at the time of trial, had worked for Amtrak since 1977. Respondent's economist repeatedly stated that his economic loss calculations were based on the assumption that respondent would work to either 65 or 70. R. 291a-295a, 306-307a.

The Superior Court's decision to order a new trial was based solely on the following two portions of the testimony. First, on cross-examination, Amtrak's counsel asked respondent's economist the following question:

> Q Are you aware that railroad employees who attain the age of 60 who have 30 years of experience are entitled to full retirement benefits?
>
> A No. I don't know the exact wording of it.

R. 300a; *see* R. 297a. Respondent objected to the question and claimed that Amtrak's counsel improperly inquired into

collateral source benefits. The court overruled the objection, but cut off any further cross-examination by Amtrak because it might inadvertently lead to testimony as to any benefits respondent was *currently* receiving due to his disability.[2]

Second, during Amtrak's case, it presented an economist who testified as to respondent's future lost wages as follows:

> I measured — assuming he would retire at 60, 62, and 66. Sixty is the age given [respondent's] seniority he could have retired from the railroad and would have been eligible for benefits. . . . [A]t age 62 if he were to retire then it turns out that given the pension benefits he would have been eligible for, he would be basically making as much after taxes from pension as he would from earnings.

R. 503a.

C. The Trial Court's Opinion On The Post-Trial Motion

Respondent argued in his post-trial motion that the evidence cited above violated the collateral source rule and as such, he was entitled to a new trial. The trial judge concluded that evidence that respondent could retire at age 60 with retirement benefits did not violate the collateral source rule. The court reasoned that it had properly allowed a "narrow" inquiry into this area in order to allow Amtrak to rebut respondent's claim that he would have worked until age 65 or 70. 26a-27a.

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2. *See* R. 301a ("[M]y concern is now that we are going to introduce inadmissible evidence over *current* benefits. I am going to suggest that you cut it off at this point because it is ready to come out of his mouth.") (emphasis added).

D. The Superior Court's Opinion

Respondent appealed to the Superior Court arguing that the collateral source rule was violated by the admission of evidence that respondent could retire at age 60 with retirement benefits. The Superior Court agreed, vacated the judgment and remanded for a new trial on liability and damages.

According to the Superior Court, this result was compelled by *Eichel*, in which this Court ruled that a railroad employer could not introduce evidence that a plaintiff was receiving disability benefits because of his injury. The Superior Court described *Eichel* as

> a straight forward application of the collateral source rule: a defendant may not introduce evidence that a plaintiff has received compensation on account of his injury from a source other than the defendant.

8a, quoting *Hileman v. Pittsburgh & Lake Erie R.R. Co.*, 546 Pa. 433, 685 A.2d 994, 997 (1996). The Superior Court then acknowledged the fundamental difference between *Eichel* and the instant case:

> The instant case presents a more attenuated link between the injury and the benefits at issue. The benefits at issue are future retirement pension benefits and not current disability benefits. *Thus, the benefits are not related to the injury.*

9a (emphasis added).

Nevertheless, the Superior Court concluded that the evidence in question was barred by the collateral source rule. It clearly recognized, however, that it was breaking new ground:

> We understand that future retirement benefits are not triggered by the injury; rather, they would have been awarded even if [respondent] had not been injured. Moreover, future retirement benefits do not improperly suggest that the [respondent] is currently being compensated for his injury from another source. *In these respects, the evidence at issue is not "classic" collateral source evidence.*

14a (emphasis added). Despite this, the Superior Court concluded that evidence of respondent's "future retirement benefits was inadmissible to show that [respondent] had an economic incentive to retire before age 65, because of the danger that the jury would use the evidence for the improper purpose of mitigating [respondent's] damages or reducing Amtrak's liability." 15a. Such a result supposedly was required by "the strong policy against the admission of collateral benefits in FELA cases," *i.e.*, *Eichel* and its progeny. 15a.

The Superior Court also rejected Amtrak's argument that respondent had "opened the door" when his expert testified he would have retired at age 65 or 70. Inexplicably, the Superior Court "agree[d] that Amtrak should be able to present evidence tending to show that [respondent] would not work beyond age 60," but in the same breath stated that "this evidence should not include the availability of early retirement benefits." 16a. The availability of such benefits, of course, is the very reason why respondent would have incentive to retire at 60.

In this regard, the Superior Court determined that the trial court had absolutely no discretion to balance the probative value and prejudicial impact of the evidence. Although it acknowledged federal appellate case law that would permit such a balancing test, the Superior Court read the Supreme Court of Pennsylvania's decision in *Hileman* as prohibiting any balancing analysis in a FELA case and thus it was "not at liberty to come to a different result." 16a.

REASONS FOR GRANTING THE WRIT

The Superior Court, by its own admission, expanded the collateral source rule as set forth by this Court in *Eichel* to a situation never addressed or contemplated in *Eichel*. Unlike the disability benefits in *Eichel*, the retirement benefits in this case are not evidence of a benefit that respondent was *currently* receiving nor are they paid because of his injury. Indeed, they are not even evidence of a benefit he will *receive* in the future. Rather, it is evidence of a future benefit that respondent *lost* because of the accident, which allegedly prevented him from working to 60 and obtaining those retirement benefits. The irony and injustice of the Superior Court's ruling is that while a FELA plaintiff can claim lost retirement benefits as part of his future economic loss claim, the railroads are now prevented from introducing evidence of those benefits to challenge the plaintiff's claim that he would have worked to age 65 or 70.

This Court should review the decision below in order to correct this gross distortion of the collateral source rule. Because the evidence at issue was neither related to the injury nor improperly suggested that respondent was already compensated for his loss, its admission did not implicate *Eichel*. The Superior Court's decision is the latest in a

growing line of FELA cases that feel compelled by *Eichel* to preclude evidence of retirement benefits to rebut a claim of an expected work life until age 65 or 70. Without this Court's intervention, the lower courts will continue to misapply *Eichel* to exclude highly relevant evidence needed to defend the enormous claims for future lost wages and benefits that are asserted in FELA cases.

Assuming *arguendo* this evidence is collateral source evidence, the Superior Court erred in finding that *Eichel* is an absolute, per se bar to any balancing of the probative value and prejudicial effect of admission of this evidence. The federal courts of appeals and state appellate courts are split on this issue. This Court's own language in *Eichel* that "the likelihood of misuse [of disability benefits] by the jury clearly outweighs the value of this evidence," 375 U.S. at 255, indicates that a balancing analysis is appropriate. This Court's review is necessary to confirm that a trial court, with its unique knowledge of the entire case, may perform a balancing analysis when considering the admission of evidence of this type.

I. THE COURT SHOULD GRANT THE WRIT TO MAKE CLEAR THAT *EICHEL* DOES NOT REQUIRE THE EXCLUSION OF REBUTTAL EVIDENCE REGARDING A RAILROAD EMPLOYEE'S ELIGIBILITY TO RETIRE AT AGE 60

A. After 38 Years, This Court Should Review *Eichel* To Clarify That It Does Not Preclude The Type Of Rebuttal Evidence Offered In This Case

Enacted at the beginning of the last century, the FELA imposes upon the railroad industry a tort-based compensation system for employees injured on the job. Thus, unlike virtually every other industry today in the United States,[3] the railroad industry must compensate injured employees under a system that contains no set limits for economic and non-economic losses. As a result, seven figure jury awards are not at all unusual for railroad employees injured on the job. Every year thousands of FELA suits are filed in the federal and state courts which share jurisdiction for such actions.[4]

In addition to being afforded unique treatment through coverage under the FELA, railroads and their employees

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3. Seamen are also covered under the FELA by virtue of the Jones Act, 46 U.S.C. App. § 688, which extends to seamen the remedies available to railroad workers under the FELA. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 29 (1990).

4. From 1995 through 1999, nearly 33,000 FELA suits were filed. Data on railroads' FELA experiences are compiled from information provided to the Association of American Railroads (AAR) by AAR members (and other railroads) in response to annual surveys.

are covered by the Railroad Retirement Act ("RRA"), 45 U.S.C. §§ 231-231u, another system design exclusively for the railroad industry. The RRA provides railroad employees with two very different kinds of benefits and the failure of the lower courts to distinguish between those different benefits gives rise to this petition. First, railroad employees are entitled to "disability" benefits if they demonstrate a physical or mental condition which disables them from working in their "regular occupation" or "in any regular employment."[5] Second, regardless of disability, railroad employees are entitled to "retirement" benefits based strictly on age and years of service.[6] For example, employees who have reached the age of 60 and completed

5. The RRA provides disability benefits for "individuals who have a current connection with the railroad industry, whose permanent physical or mental condition is such as to be disabling for work in their regular occupation, and who (A) have completed twenty years of service or (B) have attained the age of sixty." 45 U.S.C. § 231a(a)(1)(iv). In addition, disability benefits are payable, regardless of age, to individuals with 10 years of service "whose permanent physical or mental condition is such that they are unable to engage in any regular employment." 45 U.S.C. § 231a(a)(1)(v). The occupational disability benefits are funded by Tier II payroll taxes of which the railroad pays about 77% and the employee pays the balance. *Compare* 26 U.S.C. § 3221(b) *with* 26 U.S.C. § 3201(b). Thus, in fiscal year 1999, railroads paid about $1.9 billion of the total Tier II payroll tax of $2.5 billion. *See* U.S. RAILROAD RETIREMENT BOARD, 1999 ANNUAL REPORT 9 (2000).

6. Because disability benefits under the Railroad *Retirement* Act are paid by the Railroad *Retirement* Board, and because an employee on total disability is considered "retired," it is easy to confuse disability benefits with the retirement benefits discussed in the text. As used in this petition, the term "retirement benefits" will refer exclusively to the second type of benefit discussed in the text.

30 years of service are entitled to retirement benefits. 45 U.S.C. § 231a(a)(1)(ii).[7]

The FELA provides no guidance on the method of calculating damages or the impact of disability and retirement benefits on that calculation. Thus, the railroads rely on the common sense of the federal and state courts to shape this area of FELA damages law.[8] In the 93 year history of the FELA, this Court has addressed the interplay of FELA damages and railroad benefits but once, and that was the brief per curiam opinion 38 years ago in *Eichel*.[9] In recent years, this Court has not hesitated to step in and restore order and logic to other aspects of the FELA law on damages when it has taken a wrong turn. *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 341 (1988) (award for future lost earnings should be discounted to present value); *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 493-94 (1980) (the "realistic" measure of damages for future lost earnings is

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7. Individuals who have reached the age of 62 and have between 10 and 30 years of service are paid retirement benefits at a lesser rate. 45 U.S.C. § 231a(a)(1)(iii).

8. Because FELA actions filed in state court cannot be removed to federal court, 28 U.S.C. § 1445(a), state courts play an unusually significant role in interpreting this federal statute, as the instant case illustrates.

9. On several occasions, the railroads have unsuccessfully petitioned this Court to take another look at *Eichel*. *See, e.g., Giddens v. Kansas City Southern Ry. Co.*, 29 S.W.3d 813 (Mo. 2000), *cert. denied*, 121 S. Ct. 1644 (2001); *Green v. Denver & Rio Grande Western R.R. Co.*, 59 F.3d 1029 (10th Cir.), *cert. denied*, 516 U.S. 1009 (1995).

after-tax income; jury also should be instructed that its award will not be subjected to any income taxes).[10]

This case is a classic example of the FELA law on damages taking a wrong and totally illogical turn. Petitioner respectfully submits that after 38 years it is time for this Court to exercise its authority and restore some common sense to the collateral source rule as applied in FELA cases. "The collateral source rule allows a plaintiff to seek full recovery from a tortfeasor even though an independent source has compensated the plaintiff in full or in part for the loss." *See Green v. Denver & Rio Grande Western R.R. Co.*, 59 F.3d 1029, 1032 (10th Cir. 1995). This rule was intended to avoid the "danger of a jury finding no liability or reducing a damage award when it learns that plaintiff's loss is entirely or partially covered." *McGrath v. Consolidated Rail Corp.*, 136 F.3d 838, 840 (1st Cir. 1998) (internal quotation omitted).

When this Court addressed the FELA collateral source rule for the first (and only time) in *Eichel* in 1963, it was confronting a very narrow issue. The trial court had excluded evidence of the plaintiff's receipt of disability benefits that he had received as a result of his accident and that had been offered to impeach the plaintiff as to his motive for not returning to work. Before this Court, the railroad did *not* contest that the disability benefits constituted a collateral source and thus did "not dispute that it would be highly improper for the disability pension payments to be considered in mitigation of the damages suffered by [the plaintiff]."

10. *See also Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 432 (1997) (FELA plaintiffs may not recover damages for negligent infliction of emotional distress for exposure to asbestos until they manifest symptoms).

375 U.S. at 254. In *dictum* that has haunted the railroads for decades, the Court then went on to say:

> Thus it has been recognized that:
>
> The Railroad Retirement Act is substantially a Social Security Act for employees of common carriers. * * * The benefits received under such a system of social legislation are not directly attributable to the contributions of the employer, so they cannot be considered in mitigation of the damages caused by the employer. *New York, N.H. & H.R. Co. v. Leary*, 1 Cir., 204 F.2d 461, 468, cert. denied, 346 U.S. 856.

Id.[11]

The Court then rejected the railroad's argument that despite the conceded inadmissibility of collateral source payments, the disability benefits were nevertheless admissible to show that the plaintiff was malingering. Employing a classical balancing test, the Court stated:

> In our view the likelihood of misuse by the jury clearly outweighs the value of this evidence. Insofar

11. Although the Court need not determine the validity of that *dictum* in this case, it is worth noting that Amtrak, like every other major railroad in the country, disputes that *dictum* and the Court's suggestion that disability benefits are a collateral source. Because the railroad in *Eichel* did not contest the issue, it was evidently never briefed or argued to this Court. In addition, the disability benefits in *Eichel* were being paid pursuant to the Railroad Retirement Act of 1937. Under the Railroad Retirement Act of 1974, it is clear that the railroads pay for 77% of occupational disability benefits. *See* footnote 5 *supra*. Thus, contrary to the *Leary* case quoted in the *Eichel dictum*, the benefits *are* "directly attributable to the contribution of the employer."

> as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice than the receipt of a disability pension.

Id. at 255.

Thus, as the Superior Court recognized, *Eichel* involved "a straightforward application of the collateral source rule: a defendant may not introduce evidence that a plaintiff *has received* compensation *on account of his injury* from a source other than the defendant." 8a (quoting *Hileman*, 546 Pa. at 439, 685 A.2d at 997) (emphasis added). Thus, the critical fact in *Eichel* was that the plaintiff "was currently receiving disability benefits which were directly attributable to the injury at issue." 8a.

The disability benefits at issue in *Eichel* are fundamentally different than the retirement benefits in this case. To its credit, the Superior Court acknowledged that retirement benefits are to be paid in the future and are in no way attributable to respondent's injury:

> The instant case presents a more attenuated link between the injury and benefits at issue. The benefits at issue are future retirement pension benefits and not current disability benefits. Thus the benefits are not related to the injury.

9a. For this reason, the Superior Court correctly noted that evidence of retirement benefits is not "classic" collateral source evidence. 14a.

The Superior Court also noted that the traditional reasons for application of the collateral source rule were not present here:

> We understand that future retirement benefits are not triggered by the injury; rather, they would have been awarded even if [plaintiff] had not been injured. *Moreover, future retirement benefits do not improperly suggest that the plaintiff is currently being compensated for his injury from another source.*

14a (emphasis added). Nevertheless, the Superior Court felt compelled by *Eichel*, not just to follow it, but to expand it to preclude evidence of the retirement benefits.

And so, after 38 years — and without any intervening supervision by this Court — *Eichel* has now been twisted into a hard and fast rule that precludes evidence of retirement benefits. This is so even though those benefits: (1) were to be paid in the future; (2) are totally unrelated to the injury giving rise to the lawsuit; (3) "do not improperly suggest that this plaintiff is currently being compensated for his injury from another source" (14a); and (4) are to be used to rebut a plaintiff's claim that he would have worked to age 65 or 70 to inflate a lost wage claim.

The result reached by the lower court here, and the line of cases upon which it relied, bears no resemblance to the fact pattern in *Eichel*. It is not only unwarranted and illogical, it is incredibly unfair to the railroads. The retirement benefits at issue in this case were to be paid in the future at retirement and thus are often part of a plaintiff's claim for future lost fringe benefits. Indeed, a FELA plaintiff, as part of his

damage claim, "is entitled to recover damages for any diminution of the plaintiffs' retirement benefits caused by his injury." *Adams v. Burlington Northern R.R. Co.*, 865 S.W.2d 748, 750 (Mo. Ct. App. 1993). *See Raines v. New York Central R.R. Co.*, 51 Ill. 2d 428, 283 N.E.2d 230, 233 (1972) (FELA plaintiff could assert claim for lost retirement benefits even though he had been employed by railroad for only nine days prior to his injury and his right to benefits would not have vested for ten years).

In short, the FELA plaintiff can tell the jury about retirement benefits to support a claim for future lost fringe benefits, but the FELA defendant can not introduce evidence of those same benefits to argue that the plaintiff was likely to retire at age 60 instead of 65 or 70. Remarkably, it is this Court's decision in *Eichel* that has been used to achieve such a perverse result. After 38 years and no further explanation from this Court, *Eichel* has been turned upside down and inside out. Instead of precluding evidence of disability benefits currently being received because of the injury giving rise to the lawsuit, as in *Eichel*, the courts now feel compelled by *Eichel* to preclude FELA defendants (but not FELA plaintiffs) from introducing evidence of retirement benefits to have been paid in the future that are totally unrelated to the accident at issue.

B. The Court Should Grant The Writ To Resolve The Split Between The Pre-*Eichel* And Post-*Eichel* Cases On This Issue

The Superior Court of Pennsylvania's decision is not merely an isolated misapplication of *Eichel*. It found support for its decision in a growing line of state and federal cases that have excluded evidence of retirement benefits.

See, e.g., Brumley v. Federal Barge Lines, Inc., 78 Ill. App. 3d 799, 396 N.E.2d 1333, 1339-40 (1979); *Page v. St. Louis Southwestern Ry. Co.*, 349 F.2d 820, 821-22 (5th Cir. 1965); *Kimmen v. Consolidated Rail Corp.*, 1999 WL 148360, *3 (E.D. Pa. Mar. 17, 1999); *Lee v. Consolidated Rail Corp.*, 1995 WL 734108, *4-6 (E.D. Pa. Dec. 5, 1995). In fact, ever since *Eichel*, the cases on this issue have all gone one way — against the railroads — even though *Eichel* had nothing to do with retirement benefits.

The law was not always so. Before *Eichel*, the Second Circuit had stated that a railroad could introduce evidence that a FELA plaintiff was eligible to retire at age 65 with full retirement benefits because it was relevant "to the question of whether he might retire in the future, and hence not suffer a loss of earnings attributable to his injury." *Murray v. New York, New Haven & Hartford R.R. Co.*, 255 F.2d 42, 45 (2d Cir. 1958). Similarly, the Fifth Circuit had held that evidence of retirement benefits was admissible in a FELA case because it was relevant "to determine whether plaintiff retired because of his injuries or because of his age." *Page v. St. Louis Southwestern Ry. Co.*, 312 F.2d 84, 94 (5th Cir. 1963).[12]

The decision below and the cases it relied upon are in direct conflict with these pre-*Eichel* rulings. This Court should take this case to resolve the split between the pre and post-*Eichel* line of cases.

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12. *Page* was cited with approval by *Eichel* for the general proposition that an award of damages should not be reduced by payments made to the injured person from a collateral source independent of the wrongdoer. 375 U.S. at 254 n.1. The *Eichel* Court was surely aware that *Page* upheld the *admission* of retirement benefits and thus it appears that this Court did not disapprove of its conclusion. Nevertheless, after a new trial, the Fifth Circuit felt compelled by *Eichel* to reverse course and exclude the evidence. *Page v. St. Louis Southwestern Ry. Co.*, 349 F.2d 820, 821-22 (5th Cir. 1965).

C. It Does Not Make Sense To Expand The Collateral Source Rule In FELA Cases When It Is Being Cut Back Outside the FELA Arena

This Court has stated that its interpretation of the FELA should be "informed by reference to the evolving common law." *See Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 429 (1997) (internal quotation omitted). As such, it is important to note that the collateral source rule, whose origin dates back to 1854, has come under increasing criticism by courts and legal scholars alike. *See Reed v. Philadelphia, Bethlehem & New England R.R. Co.*, 939 F.2d 128, 134 (3d Cir. 1991) ("We concede that the continuing vitality of the collateral source rule has been challenged on the ground that its economic justification is marginal at best . . . .").[13]

In recent years, a number of states have severely restricted or eliminated the collateral source rule.[14] Thus, if the collateral

13. Critics of the rule argue that it results in an improper double recovery for plaintiff and actually misleads the jury because it hides information relevant to the jury's accurate assessment of damages. Joel K. Jacobsen, *The Collateral Source Rule and the Role of the Jury*, 70 Or. L. Rev. 523, 541 (1991) (arguing that "courts should not stretch the rule so as to interfere with the jury's calculation of damages"); PETER HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 193 (1988) ("The collateral source rule is the first and most vivid object lesson in how not to do things. . . . The rule could not be more wrongheaded . . . ."); *Unreason in the Law of Damages: the Collateral Source Rule*, 77 Harv. L. Rev. 741, 753 (1964) (noting that invocation of the collateral source rule has "too often been a substitute for analysis of the merits of the parties' claims").

14. *See* Michael F. Flynn, *Private Medical Insurance and the Collateral Source Rule: A Good Bet?*, 22 U. Tol. L. Rev. 39, 57-58 (Cont'd)

source rule is being cut back or restricted by state law, this Court should be wary of its expansion in FELA cases, especially in circumstances where the evidence in question is not "classic" collateral source evidence.

II. IF THE EVIDENCE IN QUESTION WAS COLLATERAL SOURCE EVIDENCE, THEN THIS COURT SHOULD RESOLVE THE SPLIT IN THE LOWER COURTS OVER WHETHER *EICHEL* ABSOLUTELY PROHIBITS ANY BALANCING ANALYSIS TO DETERMINE ADMISSIBILITY

Even the Superior Court in this case recognized that "Amtrak should be able to present evidence tending to show that [respondent] would not work beyond age 60" to rebut his claim that he would have worked until 65 or 70. 16a. Indeed, it is simply not fair to allow a FELA plaintiff to seek damages for future lost wages and benefits until age 65 or 70, but not allow a railroad to rebut that claim with evidence that the plaintiff likely would have retired at an earlier age.[15] The age at which a plaintiff would have retired

(Cont'd)

(1990) (noting that states have used several methods to limit the collateral source rule including enacting legislation specifically permitting offset of particular collateral source payments); Daena A. Goldsmith, *A Survey of the Collateral Source Rule: the Effects of Tort Reform and the Impact on Multistate Litigation*, 53 J. Air L. & Com. 799, 808-09 (1988) (listing states that have either limited or abolished the collateral source rule and noting that at least 31 states have limited the rule in particular types of actions and at least 11 have replaced the rule with a statutory scheme that eliminates it).

15. *See* 5 HON. LEONARD B. SAND, *ET AL.*, MODERN FEDERAL JURY INSTRUCTIONS ¶89.04 (2001) ("Regarding the number of years which the plaintiff would have worked, you have heard testimony from plaintiff's

(Cont'd)

makes a significant difference in the future economic loss calculation.[16] Indeed, where *Eichel* is not an issue, such evidence is clearly admissible.[17]

Even assuming *arguendo* that the evidence in question was collateral source evidence, the Superior Court improperly concluded that the trial court could not perform a balancing test to determine whether the probative value of this particular type of collateral source evidence outweighed

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(Cont'd)
expert and defendant's expert, and life expectancy and work-life expectancy tables have been admitted into evidence. It is for you to determine, based on all of this evidence, how many additional years the plaintiff would have worked.").

16. For example, respondent's economist calculated lost wage at $856,216 or $713,504, depending on whether respondent retired at 70 or 65. R. 294a-295a. Under the analysis used by Amtrak's economist, future lost wages were $565,000 or $697,000, depending on whether plaintiff retired at 60 or 66. R. 507a. The same is true for future fringe benefits lost.

17. *See, e.g., Finch v. Hercules, Inc.*, 941 F. Supp. 1395, 1414-17 (D. Del. 1996), *aff'd*, 124 F.3d 186 (3d Cir. 1997) (where a non-FELA plaintiff testified that he intended to work until age 65 or 70, the defense economist was allowed to testify that the plaintiff would have an incentive to retire before then because he would have access to an annual retirement annuity at age 62). *See also Gorniak v. National R.R. Passenger Corp.*, 889 F.2d 481, 486-87 (3d Cir. 1989) (in a FELA case in which the trial court was required to determine when the plaintiff would retire, trial judge could consider that the plaintiff could retire with full retirement benefits at 65); *Earl v. Bouchard Transp. Co.*, 735 F. Supp. 1167, 1174 (E.D.N.Y.), *modified*, 917 F.2d 1320 (2d Cir. 1990) (the trier of fact in a Jones Act case should consider a party's future intentions and dispositions toward working until a later age).

its prejudicial impact. Although the Superior Court recognized federal appellate case law permitting a balancing analysis for collateral source evidence, it felt constrained by "Pennsylvania" FELA law to find that *Eichel* does not permit such an analysis.

As the Superior Court's opinion demonstrates, lower courts are deeply split on this issue. The First Circuit does "not read *Eichel* as requiring the per se exclusion of collateral source evidence in FELA cases." *McGrath v. Consolidated Rail Corp.*, 136 F.3d 838, 841 (1st Cir. 1998). Nor does the Fifth Circuit. *See Simmons v. Hoegh Lines*, 784 F.2d 1234, 1237 (5th Cir. 1986) ("[B]enefits may be admissible for the limited purpose of proving another matter.") *Savoie v. Otto Candies, Inc.*, 692 F.2d 363, 371 n.8 (5th Cir. 1982) (*Eichel* does not appear inconsistent with balancing test permitted by Federal Rule of Evidence 403).[18]

On the other hand, the Superior Court in this case has joined the Fourth, Eighth, Ninth and Tenth Circuits and the Iowa Supreme Court in concluding that *Eichel* established an absolute prohibition of any balancing analysis. *See Riddle v. Exxon Transp. Co.*, 563 F.2d 1103, 1107 (4th Cir. 1977); *Vanskike v. Union Pacific R.R. Co.*, 725 F.2d 1146, 1152 (8th Cir. 1984); *Sheehy v. Southern Pacific Transp. Co.*, 631 F.2d 649, 652 (9th Cir. 1980); *Green v. Denver & Rio Grande Western R.R.*

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18. In addition, the Third and Eighth Circuits and the Supreme Court of Missouri have carved out a narrow exception to *Eichel* and allow the admission of collateral source benefits when a plaintiff has opened the door by putting his financial status at issue. *See Moses v. Union Pacific R.R.*, 64 F.3d 413, 416 (8th Cir. 1995); *Gladden v. P. Henderson & Co.*, 385 F.2d 480, 483 (3d Cir. 1967); *Moore v. Missouri Pacific R.R. Co.*, 825 S.W.2d 839, 842-43 (Mo. 1992). The Second Circuit has taken the same position, albeit in *dictum*. *Santa Maria v. Metro-North Commuter R.R.*, 81 F.3d 265, 272-73 (2d Cir. 1996).

Co., 59 F.3d 1029, 1033 (10th Cir. 1995); *Snipes v. Chicago Central & Pacific R.R. Co.*, 484 N.W.2d 162, 166-67 (Iowa 1992).[19]

Under this rigid approach, Federal Rule of Evidence 403 and its state counterparts are not available to balance collateral source evidence in FELA cases because *Eichel* supposedly established a per se rule excluding all collateral source evidence in FELA actions. *Sheehy*, 631 F.2d at 652; *Riddle*, 563 F.2d at 1107 ("Nothing in the new Federal Rules of Evidence authorizes departure from the rule so declared [in *Eichel.*]").

This Court should grant certiorari to resolve this split in the lower courts over whether Rule 403 (and similar state rules) are off-limits in FELA cases where collateral source evidence is at issue. Guidance is especially needed because *Eichel* predated the enactment of the Federal Rules of Evidence. Moreover, as the First Circuit noted, the balancing language of this Court's decision in *Eichel* — "the likelihood of misuse by the jury clearly outweighs the value of this evidence," 375 U.S. at 255, is consistent with the balancing analysis required by Rule 403. *McGrath*, 136 F.3d at 841. Finally, even if Rule 403 and its state counterparts can not be used to consider admission of disability benefits, it should at least be available when considering retirement benefits given the critical difference between those benefits and disability benefits and the purposes for which they may be offered.

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19. Although it is not entirely clear, the Third, Sixth and District of Columbia Circuits have also read *Eichel* in a manner that does not seem to admit any exception. *Reed*, 939 F.2d at 134; *Fuhrman v. Reading Co.*, 439 F.2d 10, 14 (3d Cir. 1971); *Wilcox v. Clinchfield R.R. Co.*, 747 F.2d 1059, 1060-61 (6th Cir. 1984); *Lamade v. Wilson*, 512 F.2d 1348, 1350 (D.C. Cir. 1975); *Caughman v. Washington Terminal Co.*, 345 F.2d 434, 435-36 (D.C. Cir. 1965).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA (OCTOBER 19, 2000)

SUPERIOR COURT OF PENNSYLVANIA

JOSEPH P. GRIESSER,

Appellant,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Appellee.

* * *

BEFORE: KELLY, JOYCE, and LALLY-GREEN, JJ.

LALLY-GREEN, J.:

¶ 1 Appellant, Joseph Griesser, appeals from the judgment entered October 26, 1999, following a jury trial. This case presents an issue of first impression in Pennsylvania regarding the interplay of the collateral source rule and the Federal Employers' Liability Act (FELA).[1] Appellant argues that the trial court erred by introducing evidence which is barred by the collateral source rule. We agree and, therefore, vacate the judgment.

¶ 2 The facts of the case are as follows. On February 7, 1994, Appellant sustained injuries in the course of his

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1. 45 U.S.C. §§ 51-60 (1908).

employment after falling backward onto the deck of a flatbed truck. On January 19, 1997, Appellant filed a FELA action against his employer, defendant/ appellee National Railroad Passenger Corporation (Amtrak). After a five-day trial in April 1998, a jury found Amtrak 50% negligent and Appellant 50% contributorily negligent. N.T., 4/14/98, at 4. The jury found that Appellant suffered a total of $419,500 in damages.[2] On October 26, 1999, the trial court entered judgment for Appellant in the amount of $209,750, reflecting Appellant's 50% contributory negligence. This appeal followed.

¶ 3 Appellant raises four issues on appeal:

> I. Whether the trial court, over vigorous objection of counsel, erroneously permitted defendant to repeatedly inject collateral source evidence into the proceedings?
>
> II. Whether the trial court's negligence instruction, which erroneously engrafted common law concepts of proximate causation onto [FELA], prejudicially impacted the verdict?
>
> III. Whether the trial court's contributory negligence instruction, which abrogated the railroad's burden of proof on this defense, erroneously sanctioned a diminution in plaintiff's

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2. The jury awarded $99,750 in past lost wages and benefits, $71,250 in future lost wages and benefits, $162,562 in past pain and suffering, and $85,938 in future pain and suffering. N.T., 4/14/98, at 4-5.

> damages under circumstances not warranted by federal decisional law?
>
> IV. Whether the trial court, absent any affirmative showing of prejudice to the defendant, erroneously denied plaintiff's request to retain a substitute expert, and whether improvident comments from the bench and opposing counsel further exacerbated the resulting harm?

Appellant's Brief at 2. Because Appellant's first issue has merit, we need not address the remaining issues.

¶ 4 Appellant argues that the trial court committed reversible error by allowing the jury to hear evidence that Appellant could retire with full pension benefits at age 60. According to Appellant, this evidence violates the collateral source rule. Before discussing the applicable law, it is necessary to examine in detail the factual basis of Appellant's claim.

¶ 5 The record reveals the following. Appellant was age 45 at the time of trial. N.T., 4/7/98, at 74. Appellant presented an expert to testify as to future lost earning capacity. N.T., 4/8/98, at 66-93. This expert's calculations were based on an expected retirement age of either 65 or 70. *Id.* at 76-77; 79-80. On cross-examination, the expert was asked whether he was "aware that railroad employees who attain the age of 60 who have 30 years of experience are entitled to full retirement benefits." *Id.* at 82. Appellant's counsel objected, arguing that evidence of such benefits would violate the collateral source rule. *Id.* at 82-85. The court overruled the

objection on the ground that the evidence "does not introduce collateral source." *Id.* at 85. After the question was repeated, the expert answered, "No. I don't know the exact wording of it." *Id.* at 85. The expert did, however, volunteer that "the figures would be the same" if Appellant retired at age 60 with full benefits, because "earnings were provided through some other means." *Id.* at 86. After a sidebar, the trial court sustained an objection to further inquiry into this matter. *Id.* at 86-88.

¶ 6 On the next day, April 9, 1998, Amtrak began presenting its case in chief. Amtrak presented an expert forensic economist to testify as to Appellant's lost earnings. Over Appellant's counsel's objection, this expert testified in relevant part as follows:

> I measured — assuming [Appellant] would retire at 60, 62, and 66. Sixty is the age given [Appellant's] seniority he could have retired from the railroad and would have been eligible for full benefits. . . . [A]t age 62 if he were to retire then it turns out that given the pension benefits he would have been eligible for, he would be basically making as much after taxes from pension as he would from earnings.

N.T., 4/9/98, at 127.

¶ 7 Our standard of review is well settled. When reviewing a trial court's denial of a request for a new trial, "we must determine whether the trial court clearly and palpably abused its discretion or committed an error of law

which affected the outcome of the case." *Brinich v. Jencka,* 757 A.2d 388, 2000 PA Super 209 at ¶ 15 (citation omitted). "When improperly admitted testimony may have affected a verdict, the only correct remedy is the grant of a new trial." *Collins v. Cooper,* 746 A.2d 615, 620 (Pa.Super.2000) (citation omitted).

¶ 8 We now turn to the interplay between FELA and the collateral source rule. FELA is a federal statute which provides the framework for handling claims of injury by federal railroad workers. *Hileman v. Pittsburgh & Lake Erie R.R.,* 546 Pa. 433, 685 A.2d 994, 998 n. 1 (1996) (citation omitted). Unlike modern systems of workers' compensation, FELA requires a claimant to prevail in a negligence action against his employer in order to recover. *Id.* at 998 n. 1.

¶ 9 "[S]tate courts have jurisdiction to try FELA claims." *Id.* at 997, citing 45 U.S.C. § 56. State courts handling FELA claims are required to apply substantive federal law. *Id.* Under FELA, the collateral source rule is a "substantive precept of federal common law," and not a rule of evidence. *Id.* Accordingly, we review the trial court's decision for an error of law and not for an abuse of discretion. *Id.* ("balancing analysis," where court weighs probative value and prejudicial effect of collateral source evidence, is inappropriate under FELA).

¶ 10 Generally, "[t]he collateral source rule provides that payments from a collateral source shall not diminish the damages otherwise recoverable from the wrongdoer." *Johnson v. Beane,* 541 Pa. 449, 664 A.2d 96, 100 (1995). This rule "was intended to avoid precluding a claimant from

obtaining redress for his or her injury merely because coverage for the injury was provided by some collateral source, *e.g.* insurance." *Beechwoods Flying Service, Inc. v. Al Hamilton Contracting Corp.*, 504 Pa. 618, 476 A.2d 350, 352 (1984); *see also, id.* at 353 (the rule is "intended to prevent a wrongdoer from taking advantage of the fortuitous existence of a collateral remedy"); *Denardo v. Carneval*, 297 Pa.Super. 484, 444 A.2d 135, 140 (1982) ("Pennsylvania law is clear; the victim of a tort is entitled to the damages caused by the tortfeasor's negligence regardless of compensation the victim receives from other sources"), *citing, inter alia, Boudwin v. Yellow Cab Co.*, 410 Pa. 31, 188 A.2d 259 (1963).

¶ 11 The seminal case regarding the collateral source rule in the context of FELA is *Eichel v. New York Cent. R. Co.*, 375 U.S. 253, 84 S.Ct. 316, 11 L.Ed.2d 307 (1963) (per curiam). In that case, the plaintiff alleged that he sustained permanent, disabling injuries as a result of his employer's negligence. The employer attempted to introduce evidence that the plaintiff was receiving disability pension payments under the Railroad Retirement Act of 1937. *Id.* at 253, 84 S.Ct. 316. The employer explained that the evidence was probative of the plaintiff's motive for not returning to work. *Id.* at 254, 84 S.Ct. 316. The trial court excluded this evidence. *Id.* The Court of Appeals for the Second Circuit reversed, holding that the evidence should have been admitted. *Id.* The Supreme Court reversed and held that the evidence was properly excluded. *Id.*

¶ 12 The Supreme Court reasoned that the disability pension benefits could not be used to offset or mitigate the employer's damages. *Id.* The Supreme Court rejected the

argument that the evidence should have been admitted to show the plaintiff's motive for not returning to work:

> In our view the likelihood of misuse by the jury clearly outweighs the value of this evidence. Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice than the receipt of a disability pension. Moreover, it would violate the spirit of the federal statutes if the receipt of disability benefits under the [Railroad Retirement Act] were considered as evidence of malingering by an employee asserting a claim under the Federal Employers' Liability Act. We have recently had occasion to be reminded that evidence of collateral benefits is readily subject to misuse by a jury. *Tipton v. Socony Mobil Oil Co., Inc.*, 375 U.S. 34 [84 S.Ct. 1] [1963]. It has long been recognized that evidence showing that the defendant is insured creates a substantial likelihood of misuse. Similarly, we must recognize that the petitioner's receipt of collateral social insurance benefits involves a substantial likelihood of prejudicial impact. We hold therefore that the District Court properly excluded the evidence of disability payments.

Id. at 255, 84 S.Ct. 316 (footnotes omitted).[3]

3. *Tipton,* cited by *Eichel,* involved a claim under the Jones Act, 46 U.S.C. § 688. The Jones Act is analogous to FELA, but is (Cont'd)

¶ 13 *Eichel* involves "a straightforward application of the collateral source rule: a defendant may not introduce evidence that a plaintiff has received compensation on account of his injury from a source other than the defendant." *Hileman*, 685 A.2d at 997. This was so even though the plaintiff in *Eichel* was currently receiving disability benefits which were directly attributable to the injury at issue.

¶ 14 Federal and state courts have followed this straightforward application of *Eichel*. *See, e.g., Green v. Denver & Rio Grande Western R. Co.*, 59 F.3d 1029, 1032-1033 (10th Cir.1995), *cert. denied*, 516 U.S. 1009, 116

(Cont'd)
applicable to seamen. *Hileman*, 685 A.2d at 998 n. 1. The primary issue in *Tipton* was whether the plaintiff was a seaman for purposes of the Jones Act. The defendant attempted to show that the plaintiff was not a seaman by introducing evidence that the plaintiff had accepted compensation benefits through a different federal statute which is explicitly inapplicable to "a member of a crew of any vessel." *Tipton*, 375 U.S. at 35, 84 S.Ct. 1. The defense not only introduced the evidence, but repeatedly commented on that evidence. *Id.* at 35, 84 S.Ct. 1. The jury found that the plaintiff was not a seaman and, thus, did not address the issue of damages. *Id.*

The Supreme Court held that, "on the record in this case," the trial court committed reversible error. *Id.* Specifically, the trial court did not issue a limiting instruction informing the jury that the evidence was relevant only to the question of whether the plaintiff was a seaman. *Id.* at 35-36, 84 S.Ct. 1. Moreover, during deliberations, the jury asked the judge whether the plaintiff would have recourse to other benefits if he were not found to be a seaman. *Id.* at 36, 84 S.Ct. 1. Thus, it appeared from the record that the jury placed undue emphasis on the availability of collateral benefits. *Id.* at 37, 84 S.Ct. 1.

S.Ct. 565, 133 L.Ed.2d 490 (1995); *Wilcox v. Clinchfield R. Co.*, 747 F.2d 1059, 1060 (6th Cir.1984); *Morse v. Southern Pac. Transportation Co.*, 63 Cal.App.3d 128, 133-134, 133 Cal.Rptr. 577, 580-581 (1976). In *Green*, 59 F.3d at 1031, the trial court determined that Railroad Retirement Act disability benefits were admissible to offset any damage award that the plaintiff might receive. On appeal, the Tenth Circuit Court of Appeals held that introduction of such evidence was reversible error, even though the jury found no liability, because of the concern that "juries will be more likely to find no liability if they know that the plaintiff has received some compensation." *Id.* at 1033-1034.

¶ 15 The instant case presents a more attenuated link between the injury and the benefits at issue. The benefits at issue are future retirement pension benefits and not current disability benefits. Thus, the benefits are not related to the injury.

¶ 16 Appellant argues that because he is permanently disabled, he is entitled to lost wages until the usual age of retirement (either 65 or 70). Implicit in this argument is that, but for the injury, Appellant would have worked until age 65 or 70. Amtrak presented evidence that if Appellant had continued working at Amtrak until age 60, he would have been able to retire with benefits equivalent to a full salary. Thus, Appellant had an incentive to retire at age 60 even if he had not been injured. Consequently, Amtrak argues, the assumption that he would have worked until age 65 or 70 is faulty.

¶ 17 No Pennsylvania state case has decided whether evidence of benefits not related to the injury is barred by the collateral source rule. Indeed, *Hileman* is the only Pennsylvania state case discussing the interplay between FELA and the collateral source rule. In that case, our Supreme Court addressed a counterpart to the collateral source rule: namely whether the court commits reversible error when it permits plaintiff to argue that he has no recourse to workers' compensation because he is a federal railroad employee. *Hileman,* 685 A.2d at 997. Our Supreme Court held, as a matter of federal and state law, that the trial court did commit reversible error. *Id.* at 997-998 (reasoning in part that the evidence is irrelevant to the issues in the case and "can serve only to create sympathy for the plaintiff and potential prejudice against the defendant").

¶ 18 Courts from other jurisdictions, however, have held that such evidence is inadmissible. One case on point is *Lee v. Consolidated Rail Corp.,* 1995 U.S. Dist. Lexis 18199, 1995 WL 734108 (E.D.Pa. December 5, 1995). In that case, the plaintiff was injured in the course of his employment with Conrail. Conrail attempted to introduce evidence that under the Railroad Retirement Board's early retirement policy, the plaintiff would have been entitled to retire at age 62 with full benefits. *Id.* at *10, 1995 WL 734108 at *4. Conrail argued that the evidence was relevant to show that the plaintiff had an incentive to retire early, even if he had not been injured. Conrail further argued that: (1) evidence pertaining to a worker's incentive to retire early is always relevant to the issue of lost wages; and (2) the collateral source rule only bars evidence of benefits paid as a result of the injury, not evidence of benefits that would have been

paid notwithstanding his injury. *Id.* at **10-12, 1995 WL 734108 at *4.[4]

¶ 19 The *Lee* court rejected these arguments, reasoning that under *Eichel* and its progeny, evidence of collateral source benefits "must be categorically excluded." *Id.* at *11, 1995 WL 734108 at *4 (citations omitted). Moreover, "any evidence that demonstrates alternative sources of compensation is inadmissible when a jury may use it to offset the plaintiff's damages." *Id.* at **12-13, 1995 WL 734108 at *4, *citing Tipton, supra; Reed v. Philadelphia, Bethlehem & New England R. Co.*, 939 F.2d 128 (3rd Cir.1991); *Page v. St. Louis Southwestern Ry. Co.*, 349 F.2d 820 (5th Cir.1965); and *Brumley v. Federal Barge Lines, Inc.*, 78 Ill.App.3d 799, 33 Ill.Dec. 609, 396 N.E.2d 1333 (1979). We find *Page* and *Brumley* particularly instructive.

¶ 20 In *Page*, a FELA case, the defendant presented evidence that the injured plaintiff was currently receiving retirement benefits under the Railroad Retirement Act. *Page*, 349 F.2d at 821. While the plaintiff claimed that he was not working as a result of the injury, the defendant argued he was simply malingering and would have retired even though no injury had occurred. *Id.* at 820-821. Citing *Eichel* and *Tipton*, the Fifth Circuit Court of Appeals held that introducing such evidence was reversible error:

> [W]e think there is no substantial basis for distinguishing this case from *Eichel* and *Tipton* . . . . Both *Tipton* and *Eichel* reflect a strong policy

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4. Amtrak raises the same arguments in the instant case. Amtrak's Brief at 12-13.

> against the use of such collateral source evidence in FELA and analogous Jones Act-maritime law seamen's cases. With the whole result in our case being the enigma wrapped in the mystery of a general verdict concealing forevermore the use or uses to which the jury might have put this evidence, we cannot say that the error, preserved by emphatic and timely objection, was harmless.

Id. at 822 (footnote omitted).[5]

¶ 21 *Brumley* arose under the Jones Act. The plaintiff in that case was 63 years old on the date of trial. *Brumley,* 33 Ill.Dec. 609, 396 N.E.2d at 1335. The trial court had excluded all evidence regarding "pension, retirement, and social security benefits plaintiff was to receive upon retirement." *Id.* at 1339. The defendant had argued that such evidence was relevant to the plaintiff's future earning capacity, and probative of the plaintiff's motivation to continue working beyond age 65. *Id.* The Appellate Court of Illinois, citing *Eichel* and *Tipton,* held that the trial court committed no error:

> The same policy considerations that warrant the exclusion of disability benefits apply equally to the same controversy. The possibility of prejudice

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5. Unlike the *Page* jury, the jury in the instant case used a special verdict form. This distinction does not compel a different result, because it is still difficult if not impossible to tell how the jury used the improperly-admitted evidence. *See, Gallo v. Yamaha Motor Corp.,* 363 Pa.Super. 308, 526 A.2d 359, 366 (1987) (following this principle with respect to erroneous jury instructions), *appeal denied,* 517 Pa. 623, 538 A.2d 876 (1988).

> resulting from the admission of social security and retirement benefits is readily apparent. The jury could easily confuse the purpose for which such evidence was admitted. . . . Accordingly, the broadly based Federal policy expressed in *Eichel* and *Tipton* precluding the admission of collateral benefits in Jones Act and F.E.L.A. cases is controlling.

Id. at 1340.[6]

¶ 22 We find the reasoning of *Lee* and the cases cited therein to be persuasive.[7] *See also, Mahon v. Reading Co.,*

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6. We have already discussed *Tipton* in footnote 3, supra. *In Reed,* the plaintiff brought against his employer under Federal Safety Appliance Act, not FELA. *Reed,* 939 F.2d at 129. Plaintiff's counsel, in closing argument, contended that the defendant tried "to deprive him of every right that he has under the law." *Id.* at 133. In response, defense counsel contended that the plaintiff had not been "cast aside"; rather, he is currently collecting disability payments. *Id.* Moreover, defense counsel suggested that the plaintiff would have retired early if the injury had not occurred: "being on disability, he felt like a free man, that he didn't have to punch a time clock." *Id.* The third Circuit Court of Appeals held that it was reversible error to all the defense to make such comments. First, evidence of disability payments has been excluded by a motion in limine, and thus was not part of the record at trial. *Id.* Next, citing *Eichel* and *Tipton,* the court held that the defense's argument had a significant likelihood of prejudicing the jury. *Id.* at 133-134.

7. We recognize that decisions from federal district courts, federal circuit courts, and out-of-state courts are not binding on this Court, even in cases involving federal substantive law. *Willard v. Interpool, Ltd.,* 2000 PA Super 235 at ¶ 6, 758 A.2d 684.

367 F.2d 25, 30 (3rd Cir.1966) (noting in *dicta* that evidence of unemployment benefits was inadmissible for any purpose in a FELA case and observing that "any benefits paid by the Railroad Retirement Board . . . cannot be taken advantage of by defendant to mitigate the damage or otherwise"); *Kirnmen v. Conrail,* 1999 U.S. Dist. Lexis 2973, 1999 WL 148360 at *3 (E.D.Pa. March 17, 1999) at *9 (evidence of retirement pension benefits were properly excluded in a FELA case because the probative value thereof would be substantially outweighed by the danger of unfair prejudice); *Finley v. AMTRAK,* 1 F.Supp.2d 440, 443-444 (E.D.Pa.1998) (granting mistrial in a FELA case where defense counsel, in opening statement, repeatedly commented to jury that plaintiff had retired and was currently receiving a disability pension).

¶ 23 We understand that future retirement benefits are not triggered by the injury; rather, they would have been awarded even if Appellant had not been injured. Moreover, future retirement benefits do not improperly suggest that the plaintiff is currently being compensated for his injury from another source. In these respects, the evidence at issue is not "classic" collateral source evidence.

¶ 24 On the other hand, there remains a significant danger that a jury will misuse and misinterpret evidence of early retirement benefits. For example, the jury could conclude that Amtrak was liable for lost wages to age 65 or 70, but then decline to award such damages because of the fortuitous existence of equivalent retirement benefits. Or, the jury could conclude that Appellant was entitled to benefits only to age 60 and was attempting to seek a double recovery

of benefits after age 60. In short, this evidence distracts the jury from the issues in the case and has a strong likelihood of prejudicing the plaintiff. Thus, we conclude that evidence of Appellant's future retirement benefits was inadmissible to show that Appellant had an economic incentive to retire before age 65, because of the danger that the jury would use this evidence for the improper purpose of mitigating Appellant's damages or reducing Amtrak's liability. In this way, we adhere to the underlying purpose of the collateral source rule in light of the strong policy against the admission of collateral benefits in FELA cases.

¶ 25 Amtrak raises several alternative arguments for affirming the trial court's decision. First, Amtrak argues that evidence of future retirement benefits was admissible to impeach the credibility of Appellant's lost-wages expert. Specifically, the evidence was admissible to show that Appellant's expert did not know that railroad workers commonly retire at age 60 if they have 30 years of service. Amtrak's Brief at 10, 12-13.

¶ 26 Under the facts of this case, this argument is misplaced. Amtrak could have pursued this line of cross-examination without alluding to the fact of early retirement benefits. *Eichel,* 375 U.S. at 255, 84 S.Ct. 316. Moreover, Amtrak introduced evidence of retirement benefits not only through cross-examination, but also through Amtrak's own case-in-chief. As noted above, Amtrak's expert explicitly told the jury that Appellant could have retired at age 60 with full benefits. N.T., 4/9/98, at 127.

¶ 27 Second, Amtrak argues that Appellant "opened the door" by claiming that he would have retired at age 65 or 70; therefore, Amtrak was permitted to present rebuttal evidence that Appellant would have worked to age 60. Amtrak's Brief at 14. We agree that Amtrak should be able to present evidence tending to show that Appellant would not work beyond age 60; however, for the reasons set forth above, this evidence should not include the availability of early retirement benefits. *Eichel,* 375 U.S. at 255, 84 S.Ct. 316.

¶ 28 Finally, Amtrak argues that the trial court had the discretion to balance the probative value and prejudicial impact of the evidence; therefore, we should review the court's decision for an abuse of discretion. Amtrak's Brief at 15-17. One federal circuit court has come to this conclusion. *McGrath v. CONRAIL,* 136 F.3d 838, 841 (1st Cir.1998). Our Supreme Court, however, has rejected this position. *Hileman,* 685 A.2d at 997. Accordingly, we are not at liberty to come to a different result.

¶ 29 In conclusion, we hold that the trial court committed an error of law when it permitted Amtrak to present evidence of collateral early retirement benefits. Given the likelihood that the jury may have used this evidence to mitigate Appellant's damages or reduce Amtrak's liability, we are constrained to remand for a new trial on liability and damages.

¶ 30 Judgment vacated. Remanded for a new trial. Jurisdiction relinquished.

APPENDIX B — OPINION OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY (MARCH 27, 2000)

IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

JANUARY TERM, 1997

No. 0649
Superior Ct # 02614EDA99

JOSEPH P. GRIESSER

Plaintiff

v.

NATIONAL RAILROAD PASSENGER
CORPORATION

Defendant

OPINION

INTRODUCTION

Joseph P. Griesser (hereinafter referred to as Plaintiff) filed this appeal before the Superior Court and argues that the verdict is against the weight of the evidence, and that this Court made erroneous evidentiary rulings; errors which entitle him to a new trial. This Court finds against Plaintiff on all issues.

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PROCEDURAL HISTORY

On February 7, 1994, Plaintiff, while in the course of his employment, stepped in a hole on a flatbed truck, causing him to fall backwards onto the deck of the truck. On January 10, 1997, Plaintiff instituted an action under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 ("FELA"), to recover damages for his injuries.

On December 31, 1997, National Railroad Passenger Corporation (hereinafter referred to as Defendant) filed several motions in limine seeking to preclude the admission of evidence, namely, certain expert reports submitted by Plaintiff after the deadline for the submission of such evidence had passed.

On January 23, 1998, Plaintiff petitioned the court for extraordinary relief, specifically to request a 30-day extension in which to obtain an orthopedic specialist. That petition was denied on February 12, 1998. (2/9/98 Order of Court)

Plaintiff subsequently filed a motion for reconsideration of the petition for extraordinary relief on February 27, 1998. On April 1, 1998, that motion was also denied. (3/26/98 Order of Court)

After these rulings, trial commenced on April 6, 1998, and on April 14, 1998 the jury rendered a verdict that attributed 50% of the causal negligence to the Defendant and attributed 50% of the causal negligence to the Plaintiff.

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Dissatisfied with the verdict, on April 22, 1998, Plaintiff filed a post-trial motion requesting a new trial pursuant to the provisions of Pennsylvania Rule of Civil Procedure (Pa.R.C.P.) 227.1(A)(1), and argued that the jury's verdict was against the weight of the evidence and that this Court committed numerous errors in its evidentiary rulings. On February 16, 1999, this Court heard oral argument on Plaintiff's post-trial motion. Said motion was denied on August 10, 1999.

On August 20, 1999, Plaintiff filed this timely appeal.

ISSUES

In response to an order issued in accordance with Pennsylvania Rule of Appellate Procedure (Pa.R.A.P.) 1925(b), Plaintiff filed of record a concise statement of matters complained of on appeal, and argued similar issues to those presented in the post-trial motion, which included:

1. Whether this Court erroneously permitted Defendant to introduce evidence of Plaintiff's entitlement to collateral source benefits in direct contravention of the clear proscriptions of the United States Supreme Court, as well as the courts of this Circuit and Commonwealth.

2. Whether this Court's jury charge erroneously engrafted common law standards of proximate and direct causation onto the Federal Employers' Liability Act, 45 U.S.C.A. § 51, ("FELA"), which merely requires, to establish

liability, a finding that a defendant's acts and/or omissions played any part, even the slightest, in producing a plaintiff's injuries.

3. Whether the Court's "choice of ways" charge erroneously permitted a jury finding of contributory negligence irrespective of any requirement that Plaintiff knew or should have known that the manner in which he chose to perform his job was unreasonable or that a safer alternative means to accomplish his assigned duties was available.

4. Whether this Court's contributory negligence charge erroneously permitted the jury to diminish Plaintiff's damages based solely upon a finding that he had assumed the risk of employment, an affirmative defense unavailable under the FELA.

5. Whether this Court erroneously failed to charge the jury on the distinction between the doctrines of contributory negligence and assumption of the risk despite the fact that the evidence adduced at trial presented a clear danger that the jury might impermissibly reduce plaintiff's recovery based solely upon the latter defense.

6. Whether this Court's charge erroneously failed to affirmatively instruct the jury that a FELA defendant, as a matter of law, had a

continuing, non-delegable duty to provide its employees with a reasonably safe place to work.

7. Whether this Court proffered an unqualified charge on Plaintiff's duty of care which improperly sanctioned a finding of contributory negligence based upon facts which would not warrant any diminution of damages.

8. Whether this Court's comparative negligence charge erroneously sanctioned the diminution of Plaintiff's damages absent any correlative finding that his conduct was a causative factor in producing his injuries.

9. Whether this Court's "sole cause" charge was not supported by the evidence.

10. Whether this Court's mitigation charge was not supported by the evidence and, as required, failed to instruct the jury that the railroad had the burden of proof to establish this affirmative defense.

11. Whether this Court erroneously refused to permit Plaintiff to retain a substitute medical expert, even though: (1) no prejudice or surprise would have inured to the Defendant; (2) there would have been no disruption of the orderly and efficient trial of the case or

other matters before this Court; and (3) there was no showing of bad faith or willfulness on the part of Plaintiff's counsel.

12. Whether this Court erroneously permitted defense counsel to elicit from its medical expert the extra judicial opinions of a non-testifying physician upon whose findings the witness did not rely.

13. Whether this Court erroneously permitted defense counsel to comment on the medical findings of a non-testifying expert, thereby prejudicially allowing closing argument on facts not in evidence.

14. Whether this Court made prejudicial comments during the proceedings which invaded the sole province of the jury to gauge Plaintiffs credibility and assess the extent of his injuries.

STATEMENT OF FACTS

Briefly, the following are the relevant facts supported by the record and which were reasonably considered by the jury in rendering its verdict:

Plaintiff worked for Defendant for 17 years. On February 7, 1994, at approximately 7:00 a.m., Plaintiff, while working for Defendant as a maintainer in Defendant's Signal Department (at the 32nd Street Shop located in Philadelphia,

Pennsylvania), was instructed to go to Defendant's Penn Coach Yard with a co-worker to pick up an air compressor and transport that compressor to a construction site in North Philadelphia. During this unloading Plaintiff was positioned in the back of the flatbed truck used to transport the compressor. When Plaintiff attempted to undo the compressor, his momentum carried him back, causing his left foot to become caught in a hole in the bed of the truck. Although Plaintiff had frequently used this specific flatbed truck and was aware of the presence of the very hole in which he fell, Plaintiff nevertheless fell backwards onto the deck of the truck as a result of the hole. (N.T. 4/6/98 at 32; N.T. 4/7/98 at 82-83; N.T. 4/8/98 at 13, 17, 21-22).

On January 19, 1997, almost three years after his accident, Plaintiff filed a complaint alleging he sustained serious and permanent injuries stemming from his fall.

However, immediately following his accident, Plaintiff did not go to the hospital despite the fact that his supervisor asked him if he wanted to do so. (N.T. 4/8/98 at 36). Plaintiff even went into work the very next day following his fall (*Id.*) Once again, Plaintiff declined another request from his supervisor that he go to the hospital. (*Id.* at 37). In fact, Plaintiff did not go to the hospital until he was prompted to do so by a "boss" at his employment later that day. (*Id.* at 38).

As a result of his injuries, Plaintiff did not work from February 8, 1994 until June 22, 1994. (N.T. 4/7/98 at 93). However, following this brief hiatus, Plaintiff returned to work until September 11, 1994. (*Id.* at 100). Although Plaintiff's employment was again interrupted from September

11, 1994 until October 1, 1995, Plaintiff again resumed his employment from October 1995 until July 1996. (*Id.* at 101).

Plaintiff also had prior medical conditions that predated his accident. In 1991, Plaintiff sought treatment for an injury to his right and left shoulders which was caused by moderate to severe trapezius spasm in the left shoulder as well as a minor degree of spasm in the right shoulder. (N.T. 4/8/98 at 4, 6). Later that year, Plaintiff visited a hand surgeon because of numbness in his left hand over the thumb and index finger. (*Id.* at 9). Then in 1992, Plaintiff started to have problems with his left shoulder again. Plaintiff was diagnosed as having Thoracic Outlet Syndrome in March 1992, and, as a result, had an operation. (*Id.* at 9-10).

Plaintiff specifically injured or strained his lower back on various occasions prior to his fall on the flatbed truck as well. Plaintiff recalls back pain predating his accident that was attributable to his daily employment. (*Id.* at 11.) Plaintiff specifically remembers wrenching his back when he picked something up with his partner. (*Id.*) However, Plaintiff also experienced back problems that were not suffered while he was at work. Plaintiff complained of pain in the right side of his back to Dr. Hart on January 8, 1991, and was subsequently treated for such. (*Id.* at 12). Plaintiff admits that he was not on the job when he began to experience this pain. (*Id.*)

In addition, when Plaintiff visited Dr. Koorvar, a pain specialist, on May 3, 1994, just several months after his accident, Plaintiff filled out a form in which he answered that the location of pain was in his "upper back," while

making no mention of any pain in his lower back (*Id.* at 43). Moreover, Plaintiff also drew a circle indicating that the correlation of his pain was in his upper back, and not in his lower back. (*Id.* at 44).

Furthermore, Plaintiff failed to produce any medical expert testimony establishing a causal connection between Plaintiff's accident and Plaintiff's lower back injuries. In fact, one doctor from which Plaintiff sought treatment noted in his April 10, 1996 report regarding Plaintiff's condition that Plaintiff's chronic pain syndrome is of "unknown origin." (Exhibit C from Defendant's 3/16/98 Motion in Limine) In addition, while being examined by Defendant's medical expert, Dr. Osterholm, Plaintiff advised Dr. Osterholm that the doctors Plaintiff was treating with informed him that he was suffering from a nerve root irritation and nerve problems in his back "due to damage with unknown causation." (Exhibit D at 7 from Defendant's 3/16/98 Motion in Limine).

Moreover, Dr. Osterholm conveyed that Plaintiff's damages "is certainly not one associating with an injury of the type this patient describes." (*Id.* at 9) Rather, Dr. Osterholm's report documents that "it is more likely to be due to a medical cause of some disease process which is . . . not associated with an injury." (*Id.*)

LAW AND DISCUSSION

As stated, Plaintiff contends that the jury's verdict is against the weight of the evidence, and that this Court erred in numerous evidentiary rulings so as to entitle him to a new trial.

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Issue I

Plaintiff's first contention is that this Court erroneously permitted Defendant to introduce evidence of Plaintiff's entitlement to collateral source benefits in direct contravention of the clear proscriptions of the United States Supreme Court, as well as the courts of this Circuit and Commonwealth.

While it is apparent that federal substantive law requires the exclusion of evidence regarding collateral source benefits in FELA cases,[1] it is equally evident that this Court astutely followed these clear proscriptions, for no evidence whatsoever concerning collateral source benefits was ever introduced at trial. Contrary to Plaintiff's assertions, the narrow issue of retirement was only admitted for the sole purpose of impeaching Plaintiff's economic expert witness as to the accuracy of that witness' calculations regarding Plaintiff's future lost earnings and work expectancy, for it was Plaintiff's witness that first introduced evidence on direct examination concerning the issue of retirement. (N.T. 4/8/98 at 70, 75-81, 83). While attempting to explain work life expectancy to the jury, Plaintiffs expert stated that the most generally accepted age used to calculate the potential number of years a person could be working was 65 and 70. (*Id.* at 75). Consequently, Plaintiff's expert was basing all of his calculations on Plaintiff's future lost earnings on the fact that Plaintiff would retire at age 65 or 70. (*Id.* at 77-81).

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1. Defendants in FELA cases are not permitted to inform the jury that a plaintiff has received benefits from a source other than the defendant. *Hileman v. Pittsburgh & Lake Erie R.R. Co.*, 546 Pa. 433, 437, 685 A.2d 994, 997 (Pa. 1996).

However, railroad employees who attain the age of 60 who have 30 years experience are entitled to full retirement benefits. (*Id.* at 85). Therefore, since Plaintiff began his employment with Defendant in May 1977, Plaintiff would have been entitled to full retirement benefits when he was 60. Defendant's cross examination was limited to that narrow issue so as to simply clarify when Plaintiff could have retired with full benefits.

Furthermore, this Court, cognizant that evidence of a plaintiff's collateral benefits must be excluded under the FELA statute, was extremely cautious to bar Defendant from introducing such inadmissable evidence, and even went so far as to articulate such concern when it perceived that Defendant may try to introduce any kind of evidence relating to Plaintiff's collateral source benefits. (N.T. 4/8/98 at 86-87) Therefore, evidence of collateral source benefits that Plaintiff may have been entitled to was never admitted into evidence.

Issue II

Plaintiff also asserts that this Court's negligence instruction erroneously engrafted common law standards of proximate and direct causation onto the FELA.

Although it is well established that under the FELA an employee is entitled to recovery if the employer's negligence played any part in producing the employee's injury, this feather-weight standard does not somehow reduce plaintiff's burden of proof, for the plaintiff must still prove ordinary negligence. *Smith v. Conrail*, 15 Phila. 371 (Pa. C.P. 1987). The law announced by the Supreme Court only states that once negligence is proven, then the plaintiff is entitled to

full recovery even though the negligence of the defendant may have played only the slightest part in producing the ultimate injuries. *Id.* If there is no negligence, there is no recovery, for liability under the FELA must be based on a showing of negligence and not on the mere fact that an employee was injured while on the job. *Hileman v. Pittsburgh & Lake Erie R.R. Co.*, 546 Pa. 433, 436, 685 A.2d 994, 996 (Pa. 1996). Hence, any injury or damage resulting in whole or in part from the employer's negligence requires a jury finding of causal relationship. *Hausrath v. New York Central R.R. Co.*, 401 F.2d 634, 637 (6th Cir. 1968). Consequently, an employer's liability under FELA is to be determined under the general rule which defines negligence. *Lehman v. National R.R. Passenger Corp.*, 443 Pa. Super. 185, 189, 661 A.2d 17, 19 (1996). Therefore, "the FELA in no way reduces plaintiff's initial burden of proving negligence itself." *Smith v. Conrail*, 15 Phila. 371 (Pa. C.P. 1987).

Accordingly, in drafting its jury instruction regarding negligence, it is evident that this Court merely observed and obeyed these authoritative legal principles concerning FELA. Although there is only a feather-weight standard of negligence under the FELA, there must nevertheless be legal, proximate cause in order to substantiate a claim of negligence under the FELA. Consequently, this Court, conscious of such legal authority, wanted to ensure that the jury determined that Defendant's negligence was the legal and proximate cause of Plaintiff's injuries. As a result, the term "substantial" in the negligence instruction was intended to modify only the proximate cause aspect of the negligence standard and was never intended to imply that the negligence itself must be substantial in order for Plaintiff to recover under the FELA.

Furthermore, the jury found that Defendant was negligent. Therefore, the jury concluded that Plaintiff met this feather-weight standard of FELA as well as the higher standard of general negligence. Consequently, even if this Court's negligence charge was erroneous, such error did not harm plaintiff, and was therefore harmless error.

Issue III

Plaintiff next claims that this Court's jury instructions erroneously permitted ~~a jury~~ finding of contributory negligence and that the jury's subsequent diminution of Plaintiff's damages based on this finding of contributory negligence was erroneously permitted by this Court as well.

Under FELA, contributory negligence is a defense. *Dale v. Baltimore & Ohio R.R. Co.*, 520 Pa. 96, 113, 552 A.2d 1037, 1045 (Pa. 1989). Contributory negligence is a careless act or omission on the plaintiff's part tending to add new dangers to conditions that the employer negligently created or permitted to exist. *Paul v. Missouri Pac. R.R. Co.*, 963 F.2d 1058, 1060 (8th Cir. 1992). Furthermore, contributory negligence includes failure to use ordinary care under existing circumstances for one's own safety, such as failure to use due care when encountering a hazard. *Sauer v. Burlington Northern R.R. Co.*, 106 F.3d 1490, 1496 (10th Cir. 1996). Contributory negligence even encompasses "a careless act or omission on the plaintiff's part tending to add new dangers to conditions that the employer negligently created or permitted to exist." *Paul v. Missouri Pac. R.R. Co.*, 963 F.2d 1058, 1060 (8th Cir. 1992).

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In addition, it is well settled that where a person has a choice of two ways, one of which is perfectly safe and the other subject to obvious risks, and voluntarily chooses the latter and is injured, he is guilty of contributory negligence. *Mattox v. City of Philadelphia*, 308 Pa. Super. 111, 117, 454 A.2d 46, 49 (1982). This "choice of paths" rule applies if two distinct ways exist, one of which is clearly recognizable as safe and the other as involving danger, and if the plaintiff has the freedom to choose between them. *Oswald v. Stewart*, 301 Pa. Super. 463, 470, 448 A.2d 1, 4 (1982). Basically the question is whether the path chosen was an obviously dangerous one, and whether a reasonably prudent person would not have followed the path chosen by the plaintiff. *Id.*

Given the facts of this case, the "choice of paths" instruction was appropriate, for Plaintiff clearly chose to perform his job in a dangerous manner despite the fact that a safer alternative was obviously available. Plaintiff was aware this flatbed truck had this existing hole in it because he had used that particular truck about 15 times that year. (N.T. 4/8/98 at 17). On the day he suffered his injury, Plaintiff was to load a compressor onto the flatbed truck, and had to therefore climb up one side of the flatbed in order to perform this task. (*Id.* at 17-18). However, despite the fact that he knew the hole in the flatbed existed and knew the precise location of this dangerous condition, Plaintiff nevertheless decided to unload the compressor from the side of the flatbed where the hole was located instead of climbing up on the other side, where no dangerous condition existed, to accomplish the job. (*Id.* at 21). Even though he had the option of climbing up either side in order to unload the compressor,

Plaintiff nevertheless chose the one that involved a dangerous condition. (*Id.* at 21-22). Therefore, Plaintiff elected to encounter an obviously dangerous path despite the fact that a safer alternative was available. Accordingly, the facts of this case warrant the "choice of paths" language to be contained in the contributory negligence instruction.

Additionally, such facts also permit a jury to find that Plaintiff was contributorily negligent under FELA. However, Plaintiff asserts that this Court's contributory negligence charge contained principles derived from the assumption of risk doctrine, a defense which is unavailable in FELA cases. *Fausher v. New Jersey Transit Rail Opers.*, 57 F.3d 1269, 1273 (3rd Cir. 1995). Assumption of risk is an employee's voluntary, knowledgeable acceptance of a dangerous condition that is necessary for him to perform his duties. *Birchem v. Burlington Northern R.R. Co.*, 812 F.2d 1047, 1049 (8th Cir. 1987).

While assumption of risk is not a defense under FELA, the facts of this case do not suggest that the jury's determination of Plaintiff's contributory negligence was rooted in assumption of risk tenets. In order for Plaintiff to assume the risk, his voluntary acceptance of the dangerous condition must be necessary for him to perform his duties. Such is not the case in this matter. Clearly, Plaintiff's decision to perform his job from the side on which he knew the hole was located illustrates that he was negligent in not choosing the safer route. It is mere sophistry for Plaintiff to argue that he "had" to accept the condition, for the very existence of the safer route nullifies per se the assumption of risk argument. Accordingly, from a legal standpoint it is

apparent that Plaintiff could never have assumed the risk of unloading the compressor from the side of the flatbed that contained the hole because it was not necessary to the performance of his duties.

Another issue raised by Plaintiff on appeal is that this Court erroneously failed to charge the jury on the distinction between the doctrines of contributory negligence and assumption of the risk despite the fact that the evidence adduced at trial presented a clear danger that the jury might impermissibly reduce plaintiff's recovery based solely upon the latter defense. However, Plaintiff attempted to inject assumption of the risk language into this Court's charge in an effort to deceive or confuse the jury. (N.T. 4/13/98 at 20) Nevertheless, as this Court explained, it is not legally possible, given the facts of this case, for Plaintiff to have assumed the risk that ultimately caused his injuries. Furthermore, this Court did not want to even "inject the assumption of risk issue where it was not warranted," for fear that "it would confuse the jury on this point." (N.T. 4/13/98 at 20).

Issue IV

Plaintiff further alleges that this Court's charge erroneously failed to affirmatively instruct the jury that a FELA defendant, as a matter of law, had a continuing, non-delegable duty to provide its employees with a reasonably safe place to work.

It is well established that a trial court has wide discretion in phrasing jury instructions. *Commonwealth v. Hawkins*,

549 Pa. 52, 701 A.2d 492, 511 (Pa. 1997). Furthermore, the charge must be considered as a whole to determine whether the trial court clearly and accurately presented the concepts of the legal issue to the jury. *Commonwealth v. Ragan*, 743 A.2d 390 (Pa. 1999).

The jury instruction given by this Court, regarding Defendant's duty to Plaintiff, consisted of the following:

> In order to find Defendant negligent, you must find the Defendant owed a duty to his employee to provide a safe workplace and safe equipment and that the employer breached that duty.
>
> Amtrak's duty to its employees is to use reasonable care in providing a workplace and equipment that is reasonably suitable and safe for the purpose and in the circumstances in which they are to be used. The test is not whether the equipment to be used and the place in which work is to be performed are absolutely safe, nor whether the employer knew the same to be unsafe, but whether the employer has exercised reasonable care and diligence to make them safe.

Although the intent of the FELA may be to provide liberal recovery for injured workers, according to the law, that recovery must be based on a finding of employer negligence. *Hileman v. Pittsburgh and Lake Erie RR Co.*, 546 Pa. 433, 442, 685 A.2d 994, 998 (Pa. 1996). The scope of the employer's duty, the degree of the employer's negligence, and other elements may be defined to ease the

plaintiff's burden, but the trial of the issues cannot be skewed in favor of either party. *Id.*

While Plaintiff may desire a skewed charge in his favor, this Court's jury instruction, viewed in its entirety, regarding Defendant's duty to Plaintiff is a true and correct charge, for this Court clearly and accurately presented the duty issue to the jury.

Issue V

Another claim raised by Plaintiff is that this Court proffered an unqualified charge on Plaintiff's duty of care which improperly sanctioned a finding of contributory negligence based upon facts which would not warrant any diminution of damages.

As mentioned earlier, contributory negligence is a viable defense under FELA. *Dale v. Baltimore & Ohio R.R. Co.*, 520 Pa. 96, 113, 552 A.2d 1037, 1045 (Pa. 1989). The Defendant raised the contributory negligence issue in the present case and presented competent evidence to the jury. This Court instructed the jury as to the relevant law concerning Plaintiff's duty of care regarding contributory negligence in fair and impartial language which fairly put the issue to the jury.

Issue VI

Plaintiff also contends that this Court's comparative negligence charge erroneously sanctioned the diminution of Plaintiff's damages absent any correlative finding that his

conduct was a causative factor in producing his injuries, and that this Court failed to instruct the jury that Defendant had the burden of proof to establish this affirmative defense.

However, Plaintiff need look no further than the express language of the jury instructions he claims to be erroneous to recognize the inaccuracies of his argument. The jury instruction reads, in pertinent part:

> It is Defendant's burden to prove by a preponderance of the evidence that Plaintiff failed in his duty to himself. If you believe that Defendant has proven this by a preponderance of the evidence, then you must find Plaintiff negligent. You must next find that Plaintiff's negligence was a substantial contributory factor in bringing about his own injuries.
>
> As I instructed you a moment ago, a substantial contributory factor is an actual real factor. It is not an imaginary, hypothetical or irrelevant factor having little or no connection with the harm suffered. It is a cause which, in a continuous and unbroken sequence produces harm that would have not occurred without it. This is legal cause.
>
> Defendant has raised this issue by claiming that Plaintiff's negligence was the legal cause of his injury. Defendant has the burden of proving this by a preponderance of the evidence.

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If you find that only Defendant was negligent and that such negligence was a substantial contributing factor, then you must find for Plaintiff.

If you find that only Plaintiff was negligent and that such negligence was a substantial contributing factor, then you must find for Defendant.

If you find that both were negligent, then you must find what percentage each was negligent. The combined percentages must equal 100%. Whatever % you find Plaintiff to be negligent, will reduce his award, if any, by the same %.

It is evident that these instructions clearly and accurately conveyed that for Plaintiff's contributory negligence to be established, not only must Plaintiff's conduct have been a causative factor in producing his injuries, but that Plaintiff's negligence must also be a substantial contributory factor in bringing about his own injuries. In doing so, this Court went to lengths further than those Plaintiff now proposes.

Furthermore, Plaintiff's additional contention that this Court failed to instruct the jury that Defendant had the burden of proof to establish contributory negligence is equally specious. This Court expressly stated not only that Defendant had the burden of proof to establish this affirmative defense, but twice went on to communicate what that accompanying burden was.

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Issue VII

Another allegation asserted by Plaintiff is that this Court's "sole cause" charge was not supported by the evidence. That portion of the jury instruction read:

> If you find that only Defendant was negligent and that such negligence was a substantial contributing factor, then you must find for Plaintiff.
>
> If you find that only Plaintiff was negligent and that such negligence was a substantial contributing factor, then you must find for Defendant.

The jury, as the sole fact-finder, was free to apply the law to the facts as it found them in this case. Consequently, the jury was properly instructed regarding Defendant's negligence as well as Plaintiff's contributory negligence. Moreover, Plaintiff's contention that this instruction was not supported by the evidence is immaterial, for the jury ultimately found that neither the conduct of Plaintiff nor Defendant was the sole cause of Plaintiff's injuries.

Issue VIII

Plaintiff additionally claim that this Court erroneously refused to permit Plaintiff to retain a substitute medical expert, even though: (1) no prejudice or surprise would have inured to the Defendant; (2) there would have been no disruption of the orderly and efficient trial of the case or other matters before this Court; and (3) there was no showing of bad faith or willfulness on the part of Plaintiff's counsel.

Appendix B

It is well established that the admission or exclusion of expert testimony is a matter within the sound discretion of the trial court. *Aiello v. Southeastern Pennsylvania Transportation Authority*, 687 A.2d 399, 402 (Pa. Commw. 1996). Furthermore, the imposition of sanctions such as excluding the use of expert witness testimony for failure to comply with a rule of discovery is largely within the discretion of the trial court. *Green Construction Co. v. Department of Transportation*, 643 A.2d 1129, 1139 (Pa. Commw. 1994). In determining whether to allow the testimony of a witness of which opposing counsel was unaware, the court must balance the facts and circumstances of each case to determine the prejudice to each party. *Feingold v. Southeastern Pennsylvania Transportation Authority*, 339 Pa. Super. 15, 21, 488 A.2d 284, 288 (Pa. Super. 1985). Such factors to consider include: (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified, (2) the ability of that party to cure the prejudice, (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court, and (4) bad faith or willfulness in failing to comply with the court's order. *Id.*

On April 23, 1997, pursuant to the Day Forward Program, the Case Management Conference for this matter was held at which time several deadlines were set, including Plaintiff's expert report deadline of December 1, 1997. (Case Management Order) (Exhibit B from Defendant's 3/16/98 Motion in Limine) Plaintiff then petitioned the court for extraordinary relief on January 23, 1998, specifically to request a 30-day extension in which to obtain an orthopedic specialist. That petition was subsequently denied on February 12, 1998.

Appendix B

However, Plaintiff maintains that the need for another orthopedic specialist to testify arose when Dr. Schwartzman, the orthopedic specialist treating Plaintiff, informed Plaintiff that he would be unavailable to testify. Plaintiff claims that he was unaware of Dr. Schwartman's unavailability prior to the December 1, 1997 deadline despite the fact that Plaintiff had more than seven months to verify whether his own expert witness would be available to testify. Accordingly, Plaintiff's lack of diligence did not provide justification for allowing Plaintiff to avail himself of the opportunity to retain an additional expert well after the mandated deadline specified in the Case Management Order.

In addition, precluding Plaintiff from substituting a supplemental expert witness that as an orthopedic specialist for Dr. Schwartzman was not prejudicial to Plaintiff, for it is apparent that Plaintiff has various options at his disposal. Of the 27 medical witnesses listed to testify on Plaintiff's behalf, such experts included other neurologic and orthopedic specialists. Therefore, Dr. Schwartzman was not Plaintiff's sole orthopedic specialist witness and Plaintiff could readily elicit testimony regarding that area of Dr. Schwartzman's expertise from another witness at Plaintiff's disposal. Furthermore, Dr. Schwartzman's unavailability was not related to any physical condition, conflict of interest, or any other valid reason. Consequently, Plaintiff could have simply subpoenaed Dr. Schwartzman to testify at trial. Therefore, Dr. Schwartzman's unavailability is as attributable to Plaintiff as it is to Dr. Schwartzman himself.

Moreover, while precluding Plaintiff from securing an additional medical expert was not prejudicial to Plaintiff, to

allow Plaintiff to do so would have been extremely prejudicial to Defendant. Throughout the discovery process and litigation Defendant often claimed that Plaintiff did not sufficiently satisfy the issue of causation, for Plaintiff never obtained a medical expert that concluded that Plaintiff's lower back injuries were caused by Plaintiff's accident. Therefore, to allow Plaintiff to obtain a new medical expert who may, for the first time, render an opinion regarding causation would have resulted in extreme prejudice to Defendant which could not be cured.

Issue IX

Plaintiff further declares that this Court erroneously permitted defense counsel to elicit extrajudicial opinions from his medical expert, thereby allowing defense counsel to comment on facts not in evidence.

While it is true that an expert may not state a conclusion which is based on evidence not in the record, it is also apparent that there is an exception to this general rule. *Commonwealth v. Thomas*, 444 Pa. 436, 445, 282 A.2d 693, 698 (Pa. 1971). The law in Pennsylvania is well-settled that a medical expert may express opinion testimony on medical matters based, in part, upon reports of others which are not in evidence, but which the expert customarily relies upon in the practice of his profession. *Allen v. Kaplan*, 439 Pa. Super. 263, 653 A.2d 1249, 1251 (Pa. Super. 1995).

Defendant's medical expert, Dr. Jewell Osterholm, testified that he customarily relies on the medical opinions of other doctors found in a patient's medical records when

formulating his medical opinion about that patient. (N.T. 4/9/98 at 20-21) Furthermore, Dr. Osterholm's reliance on the medical opinions of others is often quite significant. He testified that a patient's medical "history is extremely important" and that "90 percent (of the medical conclusion) is made on that basis." (N.T. 4/9/98 at 21). Accordingly, Dr. Osterholm reviewed the medical opinions of numerous doctors, including Dr. Barolet, regarding Plaintiff. However, in rendering his expert medical opinion, Dr. Osterholm did not act "as a mere conduit or transmitter of the content of an extrajudicial source," as Plaintiff alleges. (Appellant's Post-Trial Brief at 87). In addition to analyzing Plaintiff's lengthy medical records, Dr. Osterholm also conducted his own extensive examination of Plaintiff on November 12, 1997. (N.T. 4/9/98 at 37-42). And it was only after this examination that Dr. Osterholm formulated his own medical opinions about Plaintiff's injuries and the origin of those injuries. Consequently, the testimony given by Defendant's medical expert, Dr. Jewell Osterholm, regarding the medical opinions of a non-testifying neurosurgeon, Dr. Barolet, who previously examined Plaintiff, was well within the scope of the exception carved out for medical experts.

Issue X

Plaintiff's final argument is that this Court made prejudicial comments during the proceedings which invaded the sole province of the jury to gauge Plaintiff's credibility and assess the extent of his injuries.

While cross examining an expert witness for Defendant, Plaintiff's counsel, in an attempt to hoodwink the jury, stated

that Plaintiff "can't even stand up." (N.T. 4/9/98 at 114). This Court instructed the jury to disregard the question that contained that remark because "Mr. Griesser (has been) standing all day, as I observe." (indicating that Plaintiff had been standing in the rear of the courtroom, out of sight of the jury) (*Id.* at 115)

BY THE COURT

3-27-00
DATE

s/ Allan L. Tereshko
ALLAN L. TERESHKO, J.

APPENDIX C — PER CURIAM ORDER OF THE SUPREME COURT OF PENNSYLVANIA (APRIL 26, 2001)

IN THE SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT

No. 730 EAL 2000

JOSEPH P. GRIESSER,

Respondent

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Petitioner

PER CURIAM:

AND NOW, this 26th day of April 2001, the petition for allowance of appeal is denied.

FILED
AUG 27 2001
OFFICE OF THE CLERK

No. 01-164

IN THE
Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION,

Petitioner,

v.

JOSEPH P. GRIESSER,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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26pp

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED ON REVIEW

1. Whether this Court should dismiss this Petition for Certiorari as the grant of a new trial by the Superior Court of Pennsylvania is interlocutory?

2. Whether, in an action under the Federal Employers' Liability Act, evidence that plaintiff would have been entitled to Railroad Retirement Administration and service-related pension benefits so as to diminish his working life expectancy is barred under the collateral source rule?

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STATEMENT OF THE CASE

On February 7, 1994, Joseph Griesser suffered serious and permanently disabling injury as a result of the negligence of his employer, National Railroad Passenger Corporation ("Amtrak"). Griesser brought an FELA action against Amtrak in the Court of Common Pleas of Philadelphia County. While Griesser's claim included damages for future loss of earning capacity, he at no time claimed damages to compensate him for loss of his retirement benefits. Griesser's economist testified that his future economic loss based upon the projected current earnings for Griesser's former position with Amtrak amounted to $53,033.00 per year which, when reduced by taxes and present value, equaled $849,409.00. Griesser's economist based his work-life expectancy on various tables published by the United States government.

During the trial, Amtrak's counsel asked Griesser's economist the following question:

> Q. Are you aware that railroad employees who attain the age of 60 who have 30 years of experience are entitled to full retirement benefits?
>
> A. No. I don't know the exact wording of it.

Griesser's counsel objected to the question and claimed that Amtrak improperly inquired into collateral source benefits. The trial court overruled the objection, but cut off any further cross-examination by Amtrak on this issue.

Nonetheless, during Amtrak's case, it presented an economist who testified as to Griesser's future lost wages as follows:

> I measured -- assuming he would retire at 60, 62, and 66. Sixty is the age given [Griesser's] seniority he could have retired from the railroad and would have been eligible for benefits....[A]t age 62 if he were to retire then it turns out that given the pension benefits he would have been eligible for, he would be basically making as much after taxes from pension as he would from earnings.

Griesser objected to this question as being violative of the collateral source rule. Despite the fact that there are in existence numerous tables that deal with the potential working life expectancy of a railroader without mention of retirement benefits, Amtrak persisted in this questioning and Griesser's objection was denied. The patent fallacy that a retiree would "basically be making" as much money as a railroader earning $55,000.00 a year underlies the inappropriate purpose for which this testimony was proffered.

After a five-day trial, a jury found that Griesser was 50 percent contributorily negligent and that he had suffered a loss prior to diminution of $419.500.00. As to future lost wages, the jury determined that Griesser would have lost $162,562.00.

Griesser appealed to the Superior Court of Pennsylvania which vacated the judgment and remanded this matter for a new trial. The Superior Court concluded that the trial court had erred in permitting collateral source evidence to be presented to the jury. As the Superior Court explained, in the context of the case before it:

> [T]here remains a significant danger that a jury will misuse and misinterpret evidence of early retirement benefits. For example, the jury could conclude that Amtrak was liable for lost wages until age 65 or 70, but then decline to award such damages because of the fortuitous existence of equivalent retirement benefits. Or, the jury could conclude that [the plaintiff] was entitled to benefits only to age 60 and was attempting to seek a double recovery of benefits after age 60. In short, this evidence distracts the jury from the issues in the case and has a strong likelihood of prejudicing the plaintiff. Thus, we conclude that evidence of [plaintiff's] future retirement benefits was inadmissible to show that [he] had an economic incentive to retire before age 65, because of the danger that the jury would use

> this evidence for the improper purpose of mitigating [his] damages or reducing [the railroad's] liability. In this way, we adhere to the underlying purpose of the collateral source rule in light of the strong policy against the admission of collateral benefits in FELA cases.

Griesser v. National R.R. Passenger Corp., 2000 WL 1538611, *6 (Pa. Super. October 19, 2000).

Amtrak filed a petition for allowance of appeal to the Supreme Court of Pennsylvania which was denied.

ARGUMENT

A. *The Decision of the Superior Court of Pennsylvania Granting a New Trial Is Not a Final Order Nor Has it Been Rendered by the Highest Court of the Commonwealth of Pennsylvania. Therefore, this Court Lacks Jurisdiction Over this Matter and the Petition Should Be Dismissed.*

28 U.S.C.A. §1257 delineates the Supreme Court's power to review cases litigated in the state courts. 28 U.S.C.A. §1257; *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 77-78 (1997); *Budinick v. Becton Dickinson and Co.*, 486 U.S. 196, 201-02 (1988). The statute provides, *inter alia*, that a state court judgment or order is eligible for writ of certiorari only where it is a *final* judgment, rendered by the state's highest court. 28 U.S.C.A. §1257(a); *see also Jefferson*, 522 U.S. at 77-78; *accord Budinick*, 486 U.S. at 201-02 (finality, with respect to an appeal from a state court judgment to the Supreme Court of the United States, is determined by §1257). An order granting a new trial is interlocutory and not subject to immediate appeal, *Allied Chemical Corp. v. Daiflon*, 449 U.S. 33, 34 (1980), as is virtually any order that does not resolve the merits of the case but "decides only one thing--that the case should go to trial." *Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 24 (1966).

While Pennsylvania permits its state courts to hear interlocutory appeals of non-final orders, federal law disallows such "piecemeal appeals." *Id.* at 24. To the extent that Pennsylvania's constitution or laws contravene federal law, they are preempted. *Budinick*, 486 U.S. at 198 (citing,

28 U.S.C. §1652[1]). Accordingly, this Court is not empowered to review the order in issue.

Further, the decision of the Superior Court of Pennsylvania is not a decision of the state's highest court, *see* 42 Pa. Cons. Stat. Ann. §501 (West 1992), and for this reason alone certiorari should be denied. The decision of the Supreme Court of Pennsylvania denying the allowance of appeal is the only mandate from the highest court of the Commonwealth of Pennsylvania. That determination is uniquely within the discretion of the Supreme Court of Pennsylvania, Pa. R.A.P. 1114, and, as petitioner has not filed its petition from that decision, even this discretionary rule is not before this Court. *See Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185 (1935); *see also Nutrasweet Co. v. X-L Engineering Co.*, 227 F.2d 776, 786 (7th Cir. 2000).

Therefore, as a matter of fundamental federal law, the Court should deny the petition as it seeks to obtain review of a non-final order or judgment.

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[1] "The laws of the several states, *except* where the Constitution or treaties of the United States *or Acts of Congress* otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C.A. §1652 (emphasis added).

B. *In an Action Under the Federal Employers' Liability Act, Evidence That Griesser's Future Working Life Expectancy Would Have Been Diminished as a Result of His Entitlement to Railroad Retirement Administration and Service-related Pension Benefits Was Properly Disallowed Under the Collateral Source Rule.*

It is not inconsequential that Amtrak has failed to cite a single FELA decision which permits the introduction of RRA pension benefits under the circumstances at bar. There is no split of authority within the Circuits on this issue.

It is well established that benefits to which a plaintiff is entitled to receive from a source collateral to a tortfeasor may not serve to mitigate damages otherwise recoverable in a personal injury action. Indeed, this Court, as well as all other federal courts, have consistently recognized that the introduction of such benefits in an FELA suit as either evidence, argument, or judicial comment constitutes reversible error.[2] And as the Superior Court, in the present

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[2] *See Eichel v. New York Central R.R.*, 375 U.S. 253, 254-55 (1963); *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 35-37 (1963); *Hileman v. Pittsburgh & Lake Erie R.R.*, 546 Pa. 433, 685 A.2d 994, 997-98 (1996). *See also Reed v. Philadelphia, Bethlehem & New England R.R.*, 939 F.2d 128, 132-34 (3d Cir. 1991); *Fuhrman v. Reading Co.*, 439 F.2d 10, 14 (3d Cir. 1971); *Mahon v. Reading Co.*, 367 F.2d 25, 28-31 (3d Cir. 1966); *Snyder v. Lehigh Valley R.R.*, 245 F.2d 112, 113-16 (3d Cir. 1957); *Sinovich v. Erie R.R.*, 230 F.2d 658, 660-62 (3d Cir. 1956); *Finley v. National R.R. Passenger Corp.*, 1 F.Supp.2d 440, 443-45 (E.D. Pa. 1998); *Kimmen v. Consolidated Rail Corp.*, 1999 WL 148360, *3 (E.D. Pa., March 17, 1999); *Lee v. Consolidated Rail Corp.*, 1995 WL 734108, *4-6 (E.D. Pa. December 5, 1995). *See further Green v. Denver & Rio Grande Western R.R.*, 59 F.3d 1029, 1031-34 (10th Cir.), *cert. denied*, 516 U.S. 1009 (1995); *Phillips v. Western Co. of North America*, 953 F.2d 923, 929-30 (5th Cir. 1992); *Stillman v. Norfolk & Western Ry.*,

matter, itself fully appreciated, the same preclusionary rule which prevents the admission of collateral source benefits to offset an FELA plaintiff's damages similarly prohibits a jury from considering such evidence in assessing the extent or duration of his injury.[3] The courts, therefore, heeding the pronouncements in *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 35-37 (1963), and *Eichel*, 375 U.S. at 254-55, have persistently foreclosed reference to an FELA plaintiff's receipt of RRA disability payments to suggest that he was malingering or had a motive, apart from his disability, for not

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811 F.2d 834, 838 (8th Cir. 1981); *Wilcox v. Clinchfield R.R.*, 747 F.2d 1059, 1060-62 (6th Cir. 1984); *Vanskike v. ACF Industries, Inc.*, 665 F.2d 188, 199-200 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); *Sheehy v. Southern Pacific Transportation Co.*, 631 F.2d 649, 651-53 (9th Cir. 1980); *Bourque v. Diamond M. Drilling Co.*, 623 F.2d 351, 353-54 (5th Cir. 1980); *Raycraft v. Duluth, Missabe & Iron Range Ry.*, 472 F.2d 27, 28-29 (8th Cir. 1966); *Schroeder v. Pennsylvania R.R.*, 397 F.2d 452, 456-57 (7th Cir. 1968); *Page v. St. Louis Southwestern Ry.*, 349 F.2d 820, 820-22 (5th Cir. 1965); *Caughman v. Washington Terminal Co.*, 345 F.2d 434, 434-36 (D.C. Cir. 1965); *New York, New Haven & Hartford R.R. v. Leary*, 204 F.2d 461, 467-68 (1st Cir.), *cert. denied*, 346 U.S. 856 (1953); *Lucht v. Chesapeake & Ohio Ry.*, 489 F. Supp. 189, 190 (W.D. Mich. 1980). *And see Descoteau v. Boston & Maine R.R.*, 101 N.H. 271, 278-79, 140 A.2d 579, 585-86 (1958); *Brumley v. Federal Barge Lines, Inc.*, 78 Ill.App.3d 799, 396 N.E.2d 1333, 1339-40 (1979); *Morse v. Southern Pacific Transportation Co.*, 63 Cal.App.3d 128, 134-35, 133 Cal.Rptr. 577, 579-80 (1976).

[3] *See Eichel*, 375 U.S. at 254-55; *Reed*, 939 F.2d at 132-34; *Vanskike*, 665 F.2d at 199-200; *Sheehy*, 631 F.2d at 651-53; *Raycraft*, 472 F.2d at 28-29; *Page*, 349 F.2d at 820-22; *Caughman*, 345 F.2d at 434-36; *Kimmen*, 1999 WL 148360 at *3; *Lee*, 1995 WL 734108 at *4-6; *Sinovich*, 230 F.2d at 660-62; *Descoteau*, 140 A.2d at 585-86; *Brumley*, 396 N.E.2d at 1339-40; *Morse*, 133 Cal. Rptr. at 579-80.

resuming some form of employment.[4] Moreover, notwithstanding Amtrak's contrary claim, they have, *without exception*, similarly held evidence that an FELA plaintiff, but for his injury, would have been eligible for RRA age- and service-related pension benefits inadmissible to show that he had a financial impetus to retire earlier than alleged regardless of the accident.[5] The legislative intent of the FELA and the RRA themselves, in fact, allow for no other conclusion, *Eichel*, 375 U.S. at 255, and to rule otherwise would completely abrogate the Supreme Court's decision in *Eichel*.

And, notwithstanding Amtrak's contrary claim, even *Eichel* itself recognizes that RRA age- and service-related pension annuities, given the statutory scheme of this Act, are, by definition, collateral. *Eichel*, 375 U.S. at 255. The courts, in fact, have consistently held that these benefits may not operate to diminish a plaintiff's recovery under the FELA whether[6] or not[7] he is presently entitled to these payments.

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[4] *See Vanskike*, 665 F.2d at 199-200; *Sheehy*, 631 F.2d at 651-53; *Raycraft*, 472 F.2d at 28-29; *Mahon*, 367 F.2d at 28-31; *Caughman*, 345 F.2d at 434-36; *Sinovich*, 230 F.2d at 660-62; *Morse*, 133 Cal. Rptr. at 579-80.

[5] *See Reed*, 939 F.2d at 132-34; *Kimmen*, 1999 WL 148360 at *3; *Lee*, 1995 WL 734108 at *4-6; *Brumley*, 396 N.E.2d at 1339-40. *See also Page*, 349 F.2d at 820-22; *Descoteau*, 140 A.2d at 585-86.

[6] *See Page*, 349 F.2d at 820-22; *Sinovich*, 230 F.2d at 660-62 (last moment reiteration by defense counsel of previously barred evidence of FELA plaintiff's receipt of RRA pension benefits required a new trial; the "effect of this [evidence] though it cannot be measured precisely can be seen in the sum awarded" and "gravely and unwarrantably impaired the worth of plaintiff's claim to the jury"); *Chicago Great Western Ry. v. Peeler*, 140 F.2d 865, 868 (8th Cir. 1944)

Thus, although Amtrak strains to differentiate between RRA disability and age- and service-related pension benefits, not even the former were ever designed "to restore an injured [railroader] to a theoretical status quo."[8] *Hetrick*, 39 F. Supp. at 25. *See also Folkestad v. Burlington Northern, Inc.*, 813 F.2d 1377, 1380 (9th Cir. 1987); *Leary*, 204 F.2d at 468 (relied on by the Court in *Eichel*, 375 U.S. at 254). Accident indemnity was simply never within the Congressional intent of the RRA,[9] which is "substantially a Social Security Act for employees of common carriers" created to facilitate the retirement of elderly railroad workers. *Eichel*, 375 U.S. at 254. *See also Green v. Denver & Rio Grande Western R.R.*,

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(FELA defendant was properly precluded from introducing evidence of plaintiff's receipt of RRA pension payments during cross-examination; "an employer cannot set up in mitigation of damages in a tort action by an injured employee indemnity from a collateral source"); *Sleeman v. Chesapeake & Ohio R.R.*, 290 F. Supp. 817, 826 (W.D. Mich. 1968), *aff'd in part*, 414 F.2d 305 (4th Cir. 1969) (retirement pension benefits are a collateral source of compensation which may not diminish an FELA plaintiff's damages under the Act); *Descoteau*, 140 A.2d at 585-86.

[7] *See Reed*, 939 F.2d at 132-34; *McCarthy v. Palmer*, 113 F.2d 721, 723 (2d Cir.), *cert. denied*, 311 U.S. 680 (1940) (followed by *New York, New Haven & Hartford R.R. v. Leary*, 204 F.2d 461, 468, *cert. denied*, 346 U.S. 856 (1953), a decision relied upon by the Supreme Court in *Eichel*, 375 U.S. at 254); *Kimmen*, 1999 WL 148360 at *3; *Lee*, 1995 WL 734108 at *4-6; *Hughes v. Clinchfield R.R.*, 289 F. Supp. 374, 375-76 (E.D. Tenn. 1968); *Brumley*, 396 N.E.2d at 1339-40.

[8] In fact, not even eligibility for RRA disability payments is dependant upon injury occurring in the course of employment or as the result of a carrier's negligence. *Leary*, 204 F.2d at 467; *Hetrick v. Reading Co.*, 39 F. Supp. 22, 25 (D.N.J. 1941). Disability, therefore, is merely the occurrence upon which the right to these benefits accrues. *Hetrick*, 39 F. Supp. at 25.

[9] *See Leary*, 205 F.2d at 468; *Hetrick*, 39 F. Supp. at 25.

59 F.3d 1029, 1033 (10th Cir.), *cert. denied*, 516 U.S. 1009 (1995); *Folkestad*, 813 F.2d at 1380; *Leary*, 204 F.2d at 468; *Sinovich*, 230 F.2d at 661; *Hetrick*, 39 F. Supp. at 25. And as "benefits received under such a system of social legislation are not directly attributable to the contributions of the employer,"[10] they "cannot be considered in mitigation of damages." *Eichel*, 375 U.S. at 254 (quoting *Leary*, 204 F.2d at 468).[11] Indeed, even the FELA's own setoff provision, 45 U.S.C.A. §55, permits no other result,[12] for the RRA's age

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[10] The "retirement fund is supported by tax collections from both the employer and employee...and to a limited extent, by the general public..." *Leary*, 204 F.2d at 468.

[11] *See Green*, 59 F.3d at 1031-34; *Folkestad*, 813 F.2d at 1380; *Clark v. Burlington Northern, Inc.*, 726 F.2d 448, 451 n.2 (8th Cir. 1984); *Sinovich*, 230 F.2d at 660-61; *Hughes*, 289 F. Supp. at 375-76.

[12] Section 55 states that:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief, benefit, or indemnity that may have been paid to any injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

and service requirements remove *both* pension and disability benefits from coverage under this Section.[13] And to suggest

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45 U.S.C.A. §55. Under Section 55, therefore, the availability of a setoff depends not upon the source of the payments but on "whether they constitute a fringe benefit of employment secured by the [railroader] through his labor or are a contribution against FELA liability." *Perry v. Metro-North Commuter R.R.*, 716 F. Supp. 61, 62 (D. Conn. 1989). *See also Phillips*, 953 F.2d at 929-32; *Folkestad*, 813 F.2d at 1380; *Clark*, 726 F.2d at 450; *Russo v. Matson Navigation Co.*, 486 F.2d 1018, 1020 (9th Cir. 1973); *Haughton v. Blackships, Inc.*, 462 F.2d 788, 790 (5th Cir. 1972); *Hall v. Minnesota Transfer Ry.*, 322 F. Supp. 92, 94-96 (D. Minn. 1971).

[13] *See Leary*, 204 F.2d at 467-68 (current disability payments); *McCarthy*, 113 F.2d at 723 (possible future entitlement to pension benefits); *Hughes*, 289 F. Supp. at 376 (future pension benefits); *Hetrick*, 39 F. Supp. at 25 (future entitlement to disability benefits). *See also Manes v. Metro-North Commuter R.R.*, 801 F. Supp. 954 (D. Conn. 1992). As the court stated in Hetrick;

> It is our understanding that Congress by the passage of the [RRA] undertook to create a certain amount of economic security for employees of a railroad who engage in a work fraught with daily exposure to the hazard of injury, but peculiarly essential to the public. Under conditions defined in the law, this legislation was designed to permit elderly men to separate themselves from the service. In fact, the annuity is an inducement to the retirement of men reaching sixty-five years of age, and creates a corresponding influx of younger employees. In addition, the right to the annuity is accelerated when an employee of thirty years of service becomes totally and

otherwise would not only subvert the legislative intent of the RRA but Section 58 of the FELA which expressly preserves the rights of statutorily protected employees under other Acts of Congress.[14] *Hall.*, 322 F. Supp. at 94-96.

> permanently disabled. Under the [FELA] an injured employee is given the right to an award of damages for his injury...The object of the two pieces of legislation are entirely foreign to each other, and we are of the view that there never was a legislative intent that a jury [in determining a plaintiff's right of recovery under the FELA] was to draw into its calculations the annuities provided for by the [RRA] so that payments made by the employer under the latter legislation would be returned to it...Recovery under the [FELA] in such case is beside the point, because that is an attempted restorative alone.

Hetrick, 39 F. Supp. at 25 (followed by *Leary*, 204 F.2d at 468, a decision relied upon by the Supreme Court in *Eichel*, 375 U.S. at 254).

[14] Section 58 states that:

> Nothing in this act (45 USCS §§ 51, *et seq.*) shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress

45 U.S.C.A. §58.

Similarly lacking merit is Amtrak's claim that the opinion of the Superior Court erroneously precludes a trial judge from weighing the probative value against the prejudicial impact of collateral source evidence. In fact, though Amtrak insists otherwise, the collateral source doctrine does not merely operate as an evidentiary principle, but is, instead, a rule of substantive law. And, all courts that have addressed this issue have insisted that *Eichel* itself precludes such a balancing-of-factors analysis.[15] Indeed, these decisions have rejected outright the argument advanced by Amtrak that Federal Rule of Evidence 403 or its state counterparts have somehow displaced the restrictive language of *Eichel*.[16] *Eichel*, they maintain, has already performed this analysis and concluded, *as a matter of law*, that the introduction of collateral source benefits to challenge the extent or duration of an FELA plaintiff's injury is unduly prejudicial.[17] To the extent, therefore, that *McGrath v.*

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[15] *See Sheehy*, 631 F.2d at 652 (Federal Rule of Evidence 403 does not sanction deviation from *Eichel*); *Riddle v. Exxon Transportation Co.*, 563 F.2d 1103 (4th Cir. 1977) ("[n]othing in the...Federal Rules of Evidence authorizes departure from the rule so declared [in *Tipton* and *Eichel*]"); *Finley*, 1 F.Supp.2d 440 at 443 (under *Eichel*, a "court is not permitted to balance the prejudicial effect against the probative value of [collateral source] evidence"); *Lee*, 1995 WL 734108 at *5 (under Eichel, collateral source evidence "is not subject to a balancing-of-the-factors analysis" but "must be categorically excluded").

[16] *See Sheehy*, 631 F.2d at 652; *Riddle*, 563 F.2d at 1107; *Finley*, 1 F.Supp.2d 440 at 443; *Lee*, 1995 WL 734108 at *5. *See also Green*, 59 F.3d at 1033; *Reed*, 939 F.2d at 134; *Snipes v. Chicago, Central & Pacific R.R.*, 484 N.W.2d 162, 166-67 (Iowa 1992); *Laird v. Illinois Central Gulf R.R.*, 208 Ill.App.3d 51, 566 N.E.2d 944, 955 (1991); *Morse*, 133 Cal. Rptr. at 580.

[17] As the Ninth Circuit remarked in *Sheehy*:

Consolidated Rail Corp., 136 F.3d 838, 840-42 (1st Cir. 1998), cited by Amtrak, permits such an appraisal, it not only ignores the clear dictates of *Eichel* but is directly at odds with prevailing authority.[18] In fact, the only court to consider the *McGrath* opinion has specifically declined to follow its reasoning. *See Hottenstein v. Burlington Northern R.R.*, 1998 WL 378429, *1-2 (N.D. Ill., July 1, 1998). And as Amtrak fails to realize, even *McGrath* acknowledges the inherently harmful impact of collateral source benefits for, as was not

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> Rule 403 does provide great discretion to trial judges to make evidentiary rulings. The trial court's determination under the rule is discretionary and cannot be overturned on appeal except for abuse of discretion. [Citation omitted]. Nevertheless, the discretion normally applicable to admit all relevant evidence of collateral benefits is greatly limited in FELA cases. Rule 403 is designed as a guide for the handling of situations in which no specific rules have been formulated. *See Advisory Committee's Note*, Fed.R.Evid. 403. In *Eichel*, the Supreme Court balanced the probative value of such evidence against any unfair prejudice and determined that in such cases, the value is greatly outweighed by possible prejudice.

Sheehy, 631 F.2d at 652. *See also Riddle*, 563 F.2d at 1107; *Finley*, 1 F.Supp.2d 440 at 443; *Lee*, 1995 WL 734108 at *5. *See further Green*, 59 F.3d at 1033; *Reed*, 939 F.2d at 134; *Snipes*, 484 N.W.2d at 166-67; *Laird*, 566 N.E.2d at 955; *Morse*, 133 Cal. Rptr. at 580.

[18] *See Reed*, 939 F.2d at 134; *Finley*, 1 F.Supp.2d at 443-44; *Lee*, 1995 WL 734108 at *5; *Hileman*, 685 A.2d at 997.

done in this action, it specifically requires that this evidence be accompanied by a specific limiting instruction from the bench.[19] *McGrath*, 136 F.3d at 841.

Moreover, to suggest, as does Amtrak, that Griesser had somehow "opened the door" to RRA pension testimony would completely abrogate the exclusionary rule barring their introduction for the precise purpose for which it was proffered in this action.[20] Thus, though some courts have created a *narrow exception* to *Eichel*, even they do not contemplate carte-blanche admission of collateral source benefits. As the cases cited by Amtrak themselves recognize, such evidence may be adduced in an FELA action only after a plaintiff *voluntarily* injects these payments into the case[21]

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[19] In fact, the courts, wary of the pervasive damaging effect of such evidence, warn that not even a curative instruction from the bench may eliminate its detrimental impact. *See Sheehy*, 631 F.2d at 652 (cautionary instruction was insufficient to dispel prejudice from erroneous admission of collateral source evidence; court should have stricken evidence or instructed jury to disregard it); *Page*, 349 F.2d at 821-22; *Finley*, 1 F.Supp.2d at 444 (not even curative instruction could mitigate harm from defendant's injection of collateral source evidence into FELA action; "[o]nce this prejudicial cat is out of the bag, it is difficult for a jury's verdict to be unaffected by this information").

[20] *See Reed*, 939 F.2d at 134; *Page*, 349 F.2d at 820-22; *Kimmen*, 1999 WL 148360 at *3; *Lee*, 1995 WL 734108 at *5; *Brumley*, 396 N.E.2d at 1339-40.

[21] *See Moses v. Union Pacific R.R.*, 64 F.3d 413, 416 (8th Cir. 1995) (FELA plaintiff, in his case in chief, introduced documentary evidence which specifically referred to his worker's compensation coverage); *Lange v. Missouri Pacific R.R.*, 703 F.2d 322, 324 (8th Cir. 1983) (FELA plaintiff, on direct examination by his attorney, misrepresented that he was not receiving any disability income); *Savoie v. Otto Candies, Inc.*, 692 F.2d 363, 367-71 (5th Cir. 1982) (Jones Act plaintiff, in his case in chief, introduced evidence that he had been paid

or makes a claim of financial distress in an effort to arouse the passions and sympathy of the jury.[22] Thus, the courts expressly reject the claim that evidence of an FELA plaintiff's likely age of retirement implicates this exception.[23]

The decision of the Superior Court of Pennsylvania that Railroad Retirement Administration and service-related pension benefits were collateral sources and, therefore, improperly admitted into evidence to diminish Griesser's damages is consistent with the prior decisions of this Court

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maintenance and cure).

[22] *See Santa Maria v. Metro-North Commuter R.R.*, 81 F.3d 265, 273 (2d Cir. 1996); *Lange*, 703 F.2d at 324 (evidence admissible to impeach FELA plaintiff's assertion that he returned to work immediately following surgery as he had no savings or disability income); *Giddens v. Kansas City Southern Ry.*, 937 S.W.2d 300, 303-05 (Mo. App. 1996). Under these circumstances, collateral payments may be adduced for the limited purpose of testing the veracity of a plaintiff's claim of financial hardship. *See also Mateer v. Union Pacific Systems*, 873 S.W.2d 239, 244-25 (Mo. App. 1993) (counsel's comment that FELA provided only compensation to injured railroader did not open door to evidence that plaintiff was entitled to RRA benefits). Amtrak's suggestion that the Superior Court's decision is likely to produce confusion and inconsistent results in lower courts, therefore, is simply not accurate.

[23] *See Lee*, 1995 WL 734108 at *5-6; *Leake v. Burlington Northern R.R.*, 892 S.W.2d 359, 361-64 (Mo. App. 1995) (evidence of FELA plaintiff's receipt of RRA benefits was inadmissible to impeach his attorney's statement that he could not have retired from the railroad until he turned 65). *See also Sinovich*, 230 F.2d at 660-62 (evidence that plaintiff, since his accident, had retired from the railroad did not justify admission of evidence that he was receiving RRA pension benefits); *Descoteau*, 140 A.2d at 585-86 (evidence FELA plaintiff had retired and was receiving RRA pension benefits was inadmissible to rebut his claim that the railroad had never offered him alternate employment following his injury). Indeed, in the present action, Mr. Griesser did not even make a claim for lost retirement benefits.

and the other Circuit Courts of Appeals that have considered the issue. Accordingly, since the matter has already been decided by this Court and there is no conflict among the Courts of Appeals, there is no reason to issue a writ of certiorari.

CONCLUSION

For all the reasons set forth herein, it is respectfully requested that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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MOTION FILED
AUG 24 2001

(3)

No. 01-164

IN THE

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NATIONAL RAILROAD PASSENGER CORPORATION,
Petitioner,

v.

JOSEPH P. GRIESSER,
Respondent.

On Petition for a Writ of Certiorari to the Superior Court of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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August 24, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

31 pp

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On Petition for a Writ of Certiorari to the Superior Court of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF THE PETITION

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioner has consented to AAR's filing of a brief.[1] Respondent has refused consent.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR seeks leave to file a brief *amicus curiae* only when the case presents an issue of great significance to the railroad

[1] The letter expressing consent has been filed with the Clerk of the Court.

industry as a whole—and in those instances such requests have been granted.[2]

This case, arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, presents such an issue. The court below followed several other lower courts in attributing to a prior decision of this Court a hard and fast rule prohibiting any mention of the age at which a railroad employee seeking compensation under FELA for future lost wages would have become eligible to receive retirement benefits under the Railroad Retirement Act of 1974 (RRA), 45 U.S.C. §§ 231-231u. When a FELA plaintiff claiming a permanent disability asserts that he or she would have opted for an advanced retirement age but for the injury, such evidence often is proffered to rebut that assertion by suggesting a more realistic, earlier retirement date. However, as a result of this and like rulings in other jurisdictions, petitioner and other railroads are deprived of the right to present highly probative evidence going to a key component of damages in a FELA case. This rule, which is the product of a misapplication of a very limited holding by this Court, confers an enormous and unwarranted disadvantage on railroad defendants in numerous cases arising under FELA.

Because FELA litigation is an ongoing event for all major railroads—with several thousand FELA suits typically filed each year—AAR has a strong interest in assuring that lower courts do not improperly expand railroad liability under FELA. When AAR participates in a FELA case like this one as *amicus curiae*, it brings a broad, industry-wide perspective to the issues before the court. AAR works closely with its member railroads to address a host of issues arising under

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[2] *E.g., Consolidated Rail Corp. v. Wicker*, 119 S.Ct. 530 (1998); *CSX Transp., Inc. v. Sirbaugh*, 117 S. Ct. 1289 (1997); *Norfolk & Western Ry. v. Chittum*, 117 S. Ct. 597 (1996); *Metro-North Commuter R.R. v. Buckley*, 117 S.Ct. 379-80 (1996). All granting motion of AAR to participate as *amicus curiae*.

FELA. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, an organization of over 900 attorneys representing railroads nationwide in personal injury litigation. Thus, AAR is thoroughly familiar with the trends in FELA litigation that confront its members.

As a trade association representing the nation's major railroads, AAR can assist this Court in understanding the impact of the lower court's rulings, by bringing the perspective of an entire industry, which often is different from that of the individual litigant, who may not be in a position fully to be aware of a case's impact on the industry as a whole. In this case, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal law is not misconstrued to the detriment of railroads in the future.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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August 24, 2001

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BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 76 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues and employ 90 percent of rail workers. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest.

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

One such matter is the Federal Employers' Liability Act (FELA). 45 U.S.C. §§ 51-60. In 1908, before the concept of no-fault workers' compensation had gained a foothold in the United States, Congress enacted this tort-based remedy for railroad employees injured on the job. Subsequently, every state has enacted a workers' compensation law to cover employees within its jurisdiction. Under these laws, the concept of assigning fault for workplace injuries has been abandoned in favor of the principle that all employees suffering work-related injuries are deserving of compensation. Today, the railroad industry remains virtually the only one where work-related injuries are compensated under a fault-based system.[2] A key difference between the workers' compensation systems and FELA is that the former cap the amount of compensation available to employees, while the latter permits open-ended damages awards. *See infra* note 18.

FELA is not the only unique federal benefits statute applicable to the railroad industry. Unlike virtually all other participants in the American workforce, railroad employees are not covered by the Social Security System, but instead are covered by the Railroad Retirement Act of 1974 (RRA), 45 U.S.C. §§ 231-231u. Like the Social Security System, the RRA provides a pension to retired rail employees who have the requisite years of creditable service. The RRA allows for retirement with full benefits at an earlier age than does the Social Security System.[3] Two types of disability benefits also

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[2] Seamen are covered under FELA by virtue of 46 U.S.C. § 688. All other industries in the United States are covered by either state or federal no-fault workers' compensation systems.

[3] Retirement with full benefits is available to Social Security beneficiaries at age 65, and the Social Security "retirement age" is set to increase gradually. 42 U.S.C. § 416(l) In contrast, under the RRA, an employee with 30 years of service can retire at age 62 with full benefits, or at age 60 with a reduced benefit. *See* 45 U.S.C. §§ 231a(a)(1)(ii) and 231b(a)(3).

are available under the RRA to railroad employees suffering a disability rendering them unable to work.[4]

Each year thousands of claims and lawsuits are asserted under FELA against AAR members and other railroads.[5] In addition to offering evidence of the railroad's negligence or the employee's comparative negligence,[6] the parties often will vigorously contest the amount of damages suffered by the plaintiff. In many cases, as in the case below, the injured employee alleges a permanent disability and seeks compensation covering lost wages for the remainder of his or her projected work life.

Whether, and the extent to which the plaintiff is injured, as well as the amount of compensation owed, are issues generally decided by the jury. Whenever the plaintiff alleges that he or she cannot return to work, the jury must decide how much earning capacity has been lost. Thus, a jury determination on how many additional years, but for the injury, the plaintiff would have worked can have a significant impact on the outcome.

In this case, a state appellate court, overturning a ruling by the trial judge, prohibited the defendant from introducing a key piece of evidence going directly to the issue of when the plaintiff would have retired, *i.e.*, the age at which he would have been eligible to retire with full benefits under the RRA. The railroad sought to introduce this evidence to rebut assumptions about the age at which the plaintiff would have

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[4] Railroad employees who are unable to work in their regular occupation may qualify for an occupational disability benefit under 45 U.S.C. § 231a(a)(1)(iv); those unable to work at any job may qualify for a total disability benefit under 45 U.S.C. § 231a(a)(1)(v).

[5] In 1999, 4,970 FELA lawsuits were filed. (Data on FELA lawsuits are derived from information provided to AAR in response to annual surveys of AAR members and other railroads.)

[6] Under FELA, damages must be reduced in proportion to the employee's negligence in causing the injury. 45 U.S.C. § 53.

retired, made by the plaintiff's economist when testifying about the plaintiff's future wage loss. Nonetheless, the court below reasoned that it was compelled to exclude this evidence by a decision of this Court when, in fact, that decision never addressed the issue.

The case below represents an alarming trend in which lower courts, employing faulty logic, have extended a limited holding of this Court to formulate a rule never contemplated nor supported by any prior decisions of this Court. *See infra* note 19. This unwarranted expansion of the collateral source rule places railroads at a distinct disadvantage with respect to a key trial issue, which has a direct and significant impact on the size of damages awards in many FELA cases. Nothing in either the text of FELA or prior decisions of this Court warrants the *per se* exclusionary rule countenanced by the court below. AAR members, therefore, have a strong interest in seeking review of this case as a means of restoring balance and equity to litigation under FELA.

STATEMENT OF THE CASE

Amicus adopts the statement of the case in petitioner's brief.

SUMMARY OF THE ARGUMENT

The ruling below is the product of a misapplication of this Court's limited holding in *Eichel v. New York Cent. R.R.* In *Eichel,* this Court held that the trial court had properly used its discretion in excluding evidence of the plaintiff's receipt of occupational disability benefits under the RRA. The Court below, believing that *Eichel* set forth a broad, *per se* rule requiring the exclusion of evidence of any and all benefits that might be available to railroad employees under the RRA, prohibited the defendant from rebutting the plaintiff's assumption about when he would have retired with evidence of the age at which the plaintiff would have been eligible to retire with full RRA benefits.

Eichel characterized RRA disability benefits as a collateral source was based on an unchallenged assumption that such benefits are not attributable to the employers' contributions: in fact, railroad employers contribute three-quarters of the funding for occupational disability benefits. Inasmuch as the characterization of RRA occupational disability benefits as a collateral source is questionable, the *Eichel* decision should not be expanded to cover RRA retirement pensions which, as they are not compensation for the injury suffered, bear none of the markings of a collateral source. Evidence about the availability of a retirement pension at a certain age is probative of the age at which the plaintiff would have decided to retire. Moreover, there is no logical reason to assume such evidence would be prejudicial, or confusing to a jury, nor does *Eichel* compel a conclusion that it would be. The unwarranted extension of *Eichel* by the court below to prevent a FELA defendant from using a key piece of evidence going to the issue of damages puts railroads at a distinct disadvantage, and cannot be sustained by either prior decisons of this Court or the language or policies of FELA.

Prohibiting railroad defendants from utilizing evidence of when the plaintiff would have been entitled to retire under the RRA to rebut evidence proffered by the plaintiff, has a significant impact on the level of damages that are awarded in FELA cases. Lost earning capacity often is a major element of damages in a FELA suit-juries have awarded over $1 million for lost earnings alone in recent cases-and the plaintiff's remaining worklife, *i.e.*, the age at which the plaintiff would have retired but for the injury, is an important factor in a jury's determination of lost earning capacity. Without the ability to offer evidence to rebut plaintiffs' assertions about retirement expectations, railroads face the prospects of overcompensating FELA plaintiffs for claimed lost future earnings. Only this Court can correct the misapplication of its *Eichel* decision which has led to this result.

ARGUMENT

I. THIS COURT SHOULD REVIEW THE RULING BELOW BECAUSE IT IS AN UNWARRANTED AND ILLOGICAL EXPANSION OF ITS LIMITED HOLDING IN *EICHEL V. NEW YORK CENTRAL* WHICH UNFAIRLY PUTS FELA DEFENDANTS AT A DISTINCT DISADVANTAGE

A. The Lower Court's Reliance On *Eichel* Is Misplaced Because This Case Presents An Entirely Different Issue Than Did *Eichel*

In a case decided under the FELA nearly sixty years ago, Justice Frankfurter observed that

> a phrase begins a life as a literary expression; its felicity leads to its lazy expression; and repetition soon establishes it as a legal formula, indiscriminately used to express different and sometimes contradictory ideas.[7]

The decision below demonstrates that this observation can apply to not just a "phrase", but to an entire decision of this Court. A limited holding of this Court, the underlying premise of which was never at issue in the case, has been transformed by lower courts into an all-encompassing exclusionary rule of evidence which gives FELA plaintiffs an evidentiary "free pass" never intended by Congress.

In 1963, this Court held in *Eichel v. New York Cent. R.R.*, 375 U.S. 253 (1963), that evidence of receipt of disability benefits under the RRA could not be admitted to show that a FELA plaintiff who alleged he was permanently injured, in fact, had other motivation for not returning to work.[8] This Court held that the trial court properly found that the prejudicial effect of the evidence outweighed its probative

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[7] *Tiller v. Atlantic Coast R.R.*, 318 U.S. 54, 68 (1943) (Frankfurter, J., concurring).

[8] "*Eichel v. New York Cent. R.R.*, 319 F.2d 12, 18 (2nd Cir. 1963).

value. Having sought to introduce the evidence for the limited purpose of showing malingering by the plaintiff, the defendant never took the position in court that receipt of RRA disability benefits could be used to reduce wage loss damages. Given this "concession,"[9] and finding that more probative evidence on the issue of malingering likely existed, this Court concluded that the likelihood the jury might misuse the evidence for the improper purpose of reducing damages warranted its exclusion. *Id.* at 255.

Though the court below relied on *Eichel*, this case involves a different kind of benefit than did *Eichel*, which is relevant to a completely different trial issue. The benefit at issue in *Eichel* is available to railroad employees suffering disabilities (including disabilities suffered in the course of employment), rendering them unable to perform their normal occupation. *See supra* note 4. This occupational disability benefit, a benefit which is not available to workers covered by the Social Security System, is available to employees with twenty years of service in the railroad industry and is funded primarily by the employer.[10]

The benefits at issue in this case, also available under the RRA, have nothing to do with a disability, but rather provide for a retirement pension to qualifying railroad employees. Employees with 30 years of service may retire with full benefits at age 62, *see supra* note 3; in contrast, only reduced

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[9] "Respondent does not dispute that it would be highly improper for the disability pension to be considered in mitigation of damages suffered by petitioner." 375 U.S. at 254.

[10] The primary source of funding of RRA benefits is a two-part payroll tax levied on railroad employers and employees. Employers and employees make equal contributions under Tier I of the tax. 26 U.S.C. §§ 3201(a) and 3221(a). However, the employer contributes about three-quarters of the Tier II tax (16.1% of a 21% tax on the first $59,700 (in 2001) of each employee's earnings). 26 U.S.C. § 3221(b). Like all RRA benefits with no Social Security equivalent, occupational disability benefits are funded out of Tier II taxes.

retirement benefits are available to Social Security recipients at age 62. 42 U.S.C. § 402(q). Moreover, under the RRA, there is a second level of retirement benefit, which like the occupational disability benefits are funded out of the Tier II payroll tax. 45 U.S.C. § 231b(b).

Unlike the benefits in *Eichel*, the retirement benefits raised by petitioner at trial were not being paid on account of the injury. Moreover, the evidence here was offered directly to rebut evidence introduced by the plaintiff. The trial court understood these distinctions and admitted the evidence. On appeal, recognizing the differences between retirement and disability benefits, the court below all but admitted that *Eichel* was not on point and that its rationale did not apply. *Griesser v. National R.R. Passenger Corp.*, 761 A.2d 606, 610 (Pa. Super. 2000). Nonetheless, the court concluded that *Eichel* prohibits a railroad from even making mention of the age at which a FELA plaintiff would have been eligible to retire with full benefits under the RRA. The appellate court held that under *Eichel* "evidence of collateral source benefits 'must be categorically excluded.'" 761 A.2d at 611.

The broad exclusionary rule which the court below ascribed to *Eichel* distorts that decision beyond all recognition. Not only does the decision below go far beyond *Eichel*'s limited holding, that holding itself is a product of assumptions which never were subject to argument or briefs before this Court. Therefore, this Court should review the decision below to correct repeated misinterpretations of a prior decision which have denied railroads the right to offer a full defense under a federal statute.

B. The Rationale for the Collateral Source Rule Does Not Apply to Evidence of Benefits Available to Railroad Employees Under the RRA

Benefits that are received, or that may be received at some future time, by a railroad worker pursuant to the RRA should

not be viewed as a collateral source. Under the collateral source rule, recognized by the Supreme Court nearly a century and a half ago[11] if a plaintiff has a source of payment independent of the tortfeasor compensating for some of the losses suffered, the tortfeasor is prohibited from deducting the collateral source from the damages owed to the plaintiff. 22 Am. Jur. 2d *Damages*, § 566 (1988). The collateral source rule is based on the policy that even though the plaintiff is being compensated for part of the loss suffered as the result of the defendant's negligence and, therefore, would be made more than whole if compensated for the same loss by the defendant, the tortfeasor should not benefit from this fortuity. This policy is most compelling where the plaintiff, by having procured insurance against the loss suffered, is the source of the collateral benefit. However, this rationale does not hold where the tortfeasor is the source of the collateral benefit, as in that case, the tortfeasor is not escaping the full brunt of its negligent conduct. *See A.H. Bull Steamship Co. v. Ligon*, 285 F.2d 936, 937 (5th Cir. 1960).[12]

In *Denver & Rio Grande Western R.R. v. Green*, 59 F.3d 1029, *cert. denied*, 516 U.S. 1009 (1995), one of the cases following *Eichel*, the Tenth Circuit explained that

> The collateral source rule allows a plaintiff to seek full recovery from a tortfeasor even though an independent source has compensated the plaintiff in full or in part for the loss. The rationale for the rule is at least two-fold: First, public policy favors giving the plaintiff a double recovery rather than allowing a wrongdoer to enjoy

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[11] *The Propeller Monticello v. Mollison*, 58 U.S. (17 How.) 152 (1854).

[12] Moreover, the rationale and efficacy of the collateral source rule has come under recent criticism. *See* Petition at 18, n.13. In *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424 (1997), this Court questioned the wisdom of permitting a full tort remedy for medical monitoring of the plaintiff's allegedly exposed to asbestos when such relief might already be available through insurance or governmental regulation. *Id.* at 442.

> reduced liability simply because the plaintiff received compensation from an *independent source* (emphasis supplied) [citation omitted]. Second, by assuring a plaintiff's payments from a collateral source will not be reduced by a subsequent judgment, the rule encourages the maintenance of insurance. [citation omitted].

59 F.3d at 1032.

The language of the *Eichel* decision suggests that this Court saw RRA disability benefits as being a collateral source because they were independent of the railroad ("the benefits received . . . are not directly attributable to the contributions of the employer," 375 U.S. at 254). This assumption was never challenged by the New York Central because it never attempted to offset the disability benefits against the plaintiff's damages.

Because it was never at issue in *Eichel*, the notion that RRA occupational disability benefits are a collateral source, and therefore may not be considered in mitigation of FELA damages, was never an issue in controversy before this Court. The assumption that these benefits are "not attributable to the employer," is belied by the substantial contributions railroad employers make to fund the benefit: over three-quarters of the funding for occupational disability benefits is attributable to railroad employer contributions. *See supra* note 10. Thus, the notion, accepted nearly universally by lower courts, that they are without discretion to do anything but exclude evidence of any benefits received by a railroad worker is premised on a dubious characterization of RRA benefits. This unexamined premise, however, undergirded the *Eichel* Court's conclusion that the prejudicial effect of evidence of receipt of RRA occupational disability benefits outweighs its probative value: a conclusion which the court below extended

to prohibit petitioner from introducing important evidence related to a different type of RRA benefit.[13]

C. Evidence of a Plaintiff's Eligibility for a Retirement Pension Under the RRA Often is of Great Probative Value in a FELA Case and Will Not Confuse the Jury

Regardless of whether occupational disability benefits a FELA plaintiff is eligible to receive on account of his or her injury before reaching retirement age is a collateral source, the RRA age and service pension, which respondent would have been eligible to receive upon retirement from the railroad industry, should never be subject to exclusion under *Eichel* or any version of the collateral source rule. A key element of the collateral source rule is that the payment in question is being made to compensate the plaintiff for the same loss for which compensation is being sought from the tortfeasor. However, the relevance of retirement benefits to a FELA case is not as a payment to cover a loss also recoverable under FELA, but rather, as evidence of when the plaintiff would have voluntarily ended his railroad employment. This is highly relevant because the age at which the plaintiff would have "retired" if he had not been injured is essential to determine the extent of the wages lost as a result of the injury. While the age at which the plaintiff would have been eligible for a retirement benefit is not necessarily dispositive of when he would have voluntarily ended his railroad employment—some employees work beyond the date at which they would be eligible to retire with a pension—it is at least highly probative.

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[13] It is the position of AAR that when the opportunity presents itself, this Court should reexamine its *Eichel* decision by examining the underlying premise that RRA occupational disability benefits are a collateral source and may not be offset against wage loss damages (or introduced for other purposes) because they are not attributable to the contributions of the employer.

Not only is this evidence highly probative, there is no logical reason why evidence of when a railroad employee would have been eligible to retire with full benefits would be prejudicial. In *Eichel*, the Court was concerned that if the defendant was permitted, for the purpose of showing malingering, to elicit testimony that the employee was receiving disability benefits which would have been forfeited had he returned to work, the jury might have been inclined to take that into account when calculating damages or even when assessing liability. There is no logical reason to assume that a jury would have taken that course in the case below.

The distinction between a retirement pension and a disability benefit are straightforward and well known to lay jurors. Practically every American who is, or has been, employed (outside the railroad industry) participates in the Social Security System which provides retirement income upon reaching the statutory retirement age, and which also provides disability benefits. Thus, jurors would be generally familiar with the concept of disability benefits, which typically pay compensation when the beneficiary is disabled and unable to work. There is no reason to believe that jurors cannot distinguish this concept from retirement pensions, which are payable when an employee has reached a certain age and decides to retire, or understand the impact that the availability of a retirement pension might have on an individual's decision to remain employed or to retire.

Nonetheless, the court below, and some other lower courts, have assumed that the jury would be confused, and consequently might misuse evidence of the plaintiff's entitlement to retirement benefits. The court opined that

> the jury could conclude that Amtrak was liable for lost wages to age 65 or 70, but then decline to award such damages because of the fortuitous existence of equivalent retirement benefits. Or, the jury could conclude that Appellant was entitled to benefits only to age 60 and

> was attempting to seek a double recovery of benefits after age 60.

Griesser, 761 A.2d. at 612. There is no legal or logical reason for allowing such an assumption to be the basis for excluding probative evidence on an important issue. The jury could only have concluded that Amtrak was liable for lost wages until age 65 or 70 if it concluded the plaintiff would have continued to work until those ages. If the jury concluded the plaintiff would have retired at age 60, it would have been compelled to deny lost wages for any period beyond attaining that age.

Where the employee has introduced evidence with regard to his intended retirement date (either by his own testimony or that of an expert witness), the railroad must have the right to rebut that evidence if it believes the plaintiff would have been more likely to retire at an earlier date. Inasmuch as the date at which a worker will be eligible to retire with a full pension is a good indicator of when he actually will retire,[14] prohibiting the railroad from introducing that evidence puts it at a great disadvantage on an extremely important issue in many FELA cases. *See infra* Part II.

Even courts which strictly adhere to the rule that RRA disability benefits are a collateral source, have nonetheless recognized that simple fairness requires that when the plaintiff has introduced evidence of a particular fact that may be rebutted by evidence of his or her receipt of a benefit, that evidence must be allowed. For example, where the plaintiff has injected his/her financial condition into the case, by

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[14] Patrick J. Purcell, *Older Workers: Employment and Retirement Trends*, MONTHLY LAB. REV. 19, 29 (Oct. 2000) ("Empirical evidence indicates that more retirements occur at age 62—the earliest age at which reduced retired worker benefits are available—and at age 65—the earliest date at which full retired workers benefits are available—than at other ages."); Natalie Kramer, *Employee Benefits for Older Workers*, MONTHLY LAB. REV. 21, 25 (April 1995) (noting that an important factor in deciding when to retire is the amount of retirement benefits available).

testifying to the lack of financial resources, the defendant may introduce evidence of receipt of RRA disability benefits to show that, in fact, the plaintiff is not impecunious. *Lange v. Missouri Pac. R.R.*, 703 F.2d 322 (8th Cir. 1983); *Gladden v. Henderson & Co.*, 385 F.2d 480 (3rd Cir. 1968); *Moore v. Missouri Pac. R.R.*, 825 S.W.2d 839 (Mo. Banc 1992). In *Gladden*, the court reasoned that "the collateral benefit rule cannot be made a springboard from which a plaintiff may go forward with affirmative evidence . . . and then seek immunity from cross-examination regarding it. 385 F.2d at 484.

Similarly, when a FELA plaintiff has put forth evidence of when he or she would have retired, the defendant should be permitted to rebut such evidence with reference to the date on which retirement benefits would have been available under the RRA. Permitting this evidence would not only restore balance to FELA litigation, it would be consistent with the underlying policy of FELA of providing compensation only for the actual loss suffered. *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490 (1980) (Defendant is permitted to introduce evidence of the effect of income taxes on lost wages so the jury will not overcompensate the plaintiff.); *Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59, 71 (1913).

D. Eichel Does Not Prohibit Trial Courts From Using Their Discretion to Balance the Probative Value of Evidence of RRA Benefits Against Possible Prejudicial Effects

Rather than prohibiting a balancing test, *Eichel* utilized a traditional balancing analysis in upholding the discretion exercised by the trial court in that case:

> In our view the likelihood of misuse by the jury clearly outweighs the value of this evidence . . . . there will generally be other evidence having more probative value and involving less likelihood of prejudice than the receipt of a disability pension . . . . Similarly, we must recognize that the petitioner's receipt of collateral social

> insurance benefits involves a substantial likelihood of prejudicial impact. We hold therefore that the District Court properly excluded the evidence of disability payments.

Eichel, 375 U.S. at 255. It is clear that *Eichel* did not adopt a bright-line *per se* rule of exclusion. Instead, this Court simply held that the trial judge properly applied the balancing test, now required under Fed. R. Evid. Rule 403, and, therefore, did not abuse its discretion in excluding the evidence.[15]

While some courts have misread *Eichel* as standing for a *per se* rule of exclusion,[16] others have recognized that *Eichel* is consistent with a balancing analysis, creating a split in the Circuits on this issue. *See* Petition at 21-22. In *McGrath v. Consolidated Rail Corp.*, 136 F.3d 838 (1st Cir. 1998), the First Circuit reviewed the trial judge's decision to admit evidence of the plaintiff's receipt of RRA benefits for abuse of discretion, properly interpreting *Eichel* as requiring that the admissibility of this evidence be subjected to the Rule 403 balancing test:

> We do not read *Eichel* as requiring the per se exclusion of collateral source evidence in FELA cases. . . . [T]he narrower question in *Eichel* was simply "whether or not to uphold the district court's discretionary ruling." [citation omitted]. Indeed, although the Supreme Court decided *Eichel* prior to the enactment of the current Federal Rules of Evidence, the analysis in the *Eichel*

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[15] Rule 403 vests in the trial judge broad discretion to exclude relevant evidence, the probative value of which is outweighed by its prejudicial impact on the party opposing its admission.

[16] *See e.g., Green supra*; *Wilcox v. Clinchfield R.R.*, 747 F.2d 1059 (6th Cir. 1984); *Sheehy v. Southern Pac. Transp. Co.*, 631 F. 2d 649 (9th Cir. 1980) ("[c]ourts have consistently interpreted *Eichel* to preclude admission of evidence of collateral benefits...the discretion normally applicable to admit all relevant evidence of collateral benefits is greatly limited in FELA cases." 631 F. 2d at 651-652).

> decision "does not appear inconsistent with Rule 403." [citation omitted]. . . . We do not believe that the *Eichel* court established a bright-line rule barring the admission of collateral source evidence on the issue of malingering. The Supreme Court simply determined that the district (sic) court abused its discretion because the prejudicial impact of the evidence outweighed its probative value. Here, we come to the opposite conclusion.

136 F.3d 838, 841 (1998).

In contrast, the reliance by the court below on *Hileman v. Pittsburgh & Lake Erie R.R.*, 685 A.2d 994 (Pa. 1996), to support its conclusion that it is impermissible to balance the probative value of evidence related to RRA benefits against the likelihood of prejudice, is misplaced. In *Hileman* the court held it was improper to advise the jury that the plaintiff was not eligible to receive workers' compensation benefits. By analogy, the court below reasoned that it was similarly impermissible to advise the jury of the plaintiff's eligibility for retirement benefits under the RRA.

These situations are distinguishable. In a FELA suit, the employee's ineligibility for workers' compensation benefits is entirely irrelevant. Congress has determined that rail employees are entitled to compensation for work-related injuries only if the injury results from the employer's negligence,[17] regardless of whether the worker is without another source of compensation. Advising of a worker's ineligibility can only serve the purpose of causing the jury to look for a reason to award compensation; it has no bearing whatsoever on the employer's liability or the level of damages. Thus, there is no probative value to balance against the prejudicial effect. *Stillman v. Norfolk & Western Ry.*, 811 F.2d 834 (4th Cir.

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[17] FELA "does not make the employer the insurer of the safety of his employees while they are on duty." *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994); *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947).

1987); *Weinell v. McKeesport Commuter R.R.*, 411 F.2d 510 (3rd. Cir. 1969).

On the other hand, the age at which a rail employee would have been eligible for RRA retirement benefits is very pertinent to the question of when the employee would have decided to retire and cease earning wages and, therefore, to an element of damages. In fact, since most members of a jury are likely to be far more familiar with the Social Security System than with the RRA, they may harbor misimpression about the latter and erroneously assume that normal retirement age under the RRA is the same as under Social Security. In fact, the RRA permits retirement at full benefits at an earlier age than does the Social Security System. *See supra* note 3. Without information about the former, the jury will be misled about the extent of a FELA plaintiff's wage loss.

Since the adoption of Fed. R. Evid. Rule 403, a balancing test is the standard by which the admissibility of a plaintiff's receipt of collateral source benefits should be judged. This Court should review this case in order to clarify this aspect of its *Eichel* decision and unburden the lower courts from the shackles some have imposed on themselves by their improper readings of *Eichel*.

II. THIS COURT SHOULD REVIEW THIS CASE BECAUSE EXCLUDING EVIDENCE ON WHEN A FELA PLAINTIFF WOULD BE ELIGIBLE TO RETIRE WITH A FULL RRA AGE AND SERVICE PENSION WILL HAVE A SIGNIFICANT IMPACT ON THE OUTCOME OF MANY FELA CASES

This court should clarify its *Eichel* decision because its misapplication by the court below will have a tremendous impact on the level of damages awarded in many of the thousands FELA suits filed each year. A fundamental difference between FELA and workers' compensation is that

the latter generally caps the amount of wage loss benefits payable, while under FELA there are no such limits.[18] Thus, not only can FELA verdicts be substantial, a major component of any FELA suit where a disabling injury is alleged is future lost wages (or earning capacity) of the plaintiff. This amount is arrived at by determining the plaintiff's remaining work life and the difference between what the plaintiff was earning before the injury and his or her earning capacity in the future, subject to a duty to mitigate damages. *See DeBiassio v. Illinois Cent. R.R.*, 52 F.3d 678, 687-88 (7th Cir. 1995)

Verdicts for substantial future lost wages, running well over $1 million, are frequently returned by FELA juries. *E.g.*, *DeBiassio supra* (award of $1.15 million for future lost earnings upheld.); *Maliska v. Southern Pac. Transp. Co.*, No. B-153, 936 (Jefferson Cty. Dist. Ct., Beaumont, Tx. 1998) (awarding $2 million for future wage loss), *reprinted* in 18 No. 7 Verdicts, Settlements & tactics 307 (July 1998); *Crouch v. CSX Transp., Inc.*, No. L 94-1055 (Portsmouth, Va. Feb. 10 1997) ($12 million awarded to plaintiff whose future wage loss claim had a present value of $1.3 million), *reprinted* in 17 No. 5 Verdicts, Settlements & Tactics 31 (May 1997). Thus, the assumptions juries make when

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[18] "[T]he amount of compensation for disability depends on the workers' previous earning level, for most acts award a percentage of average wage, somewhere between a half and two thirds. But practically all acts also set a maximum in terms of dollars per week . . ." 1 A. LARSON & K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 1.03[5] (2000 ed.). "It was never intended that compensation payments [under workers' compensation] should equal actual loss, if for no other reason than that such a scale would encourage malingering." *Id.* On the other hand, a compensatory damages award under FELA will be deemed excessive only if it "shocks the judicial conscience." *Schneider v. National R.R. Passenger Corp.*, 987 F.2d 132, 137 (2d Cir. 1993). ($1.75 million verdict, including over $1 million in intangible damages, not excessive).

calculating wage loss damages play an important role in the outcome of a case.

When the parties offer the jury different assumptions about when, but for the injury, the plaintiff would have retired, and thus, ceased to earn wages from the railroad, a substantial amount of money may be at stake. *See* Petition at 20, n. 16. Therefore, it is essential the jury have some basis for deciding which assumption is more likely. In FELA cases, juries typically are given wide discretion to make determinations of fact, *see Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, *reh'g denied*, 353 U.S. 943 (1957), including questions about the extent of damages suffered. *Schirra v. Delaware, L. & W. R.R.*, 103 F.Supp. 812, 823 (M.D. Pa. 1952); *Seaboard Coast Line R.R. v. Gillis*, 321 So.2d 202, 208 (Ala. 1975). Remarkably, the court below saw fit to deny the jury important evidence directly related to the extent of the damages suffered, on the unsupported assumption that it would confuse the jury.[19] This Court has never suggested, nor is there any reason to assume, that juries are likely to confuse the purpose of retirement benefits with disability benefits to the point where evidence of the former must be categorically excluded despite its relevance to an important issue in many cases.

Prior to *Eichel*, lower courts freely used their discretion to permit the introduction of evidence of the age at which an employee would have been eligible for retirement benefits. *Murray v. N.Y., N.H. & Hartford R.R.*, 255 F.2d 42 (2nd Cir.

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[19] Other courts have taken it upon themselves similarly to expand *Eichel*. *See Brumley v. Federal Barge Lines, Inc.*, 396 N.E.2d 1333 (Ill. App. 1979) (Jones Act case) ("The possibility of prejudice resulting from the admission of social security and retirement benefits is readily apparent. The jury could easily confuse the purpose for which such evidence was admitted." *Id.* at 1340.); *Lee v. Consolidated Rail Corp.*, 1995 WL 734108 (E.D. Pa. 1995); *Kimmen v. Consolidated Rail Corp.*, 1999 WL 148360 (E.D. Pa. 1999)).

1958) (A plaintiff's "pension rights were relevant to a determination of his probable lost future earnings." *Id.* at 45.); *See also Reiner v. Northern Pac. Terminal Co.*, 259 F.2d 438, 440-41 (9th Cir. 1958); *Simmons v. Union Terminal Co.*, 290 F.2d 453 (5th Cir. 1961). The consequence of the subsequent retreat from this logic is greatly to inflate in many FELA cases the level of damages for which railroads are liable.

Only this Court can correct the prevailing assumption by lower courts that they have been stripped by *Eichel* of their normal discretion to weigh the probative value of evidence. This Court has granted *certiorari* in other cases to address claims that the lower courts misconceived the meaning of a prior Supreme Court decision. *See e.g.,Wilkinson v. United States*, 365 U.S. 399 (1961)("We granted certiorari [citation omitted] to consider the petitioner's claim that the Court of Appeals misconceived the meaning of the Barenblatt [v. United States] decision." *Id.* at 401.); *Johnson v. United States*, 333 U.S. 46 (1948) ("This case is here on a petition for a writ of certiorari which we granted because of the seeming misapplication of Jesionowski v. Boston & M.R. Co. [citation omitted]." *Id.* at 47.) There could not be a starker example than the case below of a lower court misconceiving a decision of this Court with persistent and recurring real world consequences.[20]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari in this case should be granted.

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[20] This Court also has granted *certiorari* in other recent cases to assure that lower courts interpret FELA correctly. *E.g., Norfolk & Western Ry. v. Hiles*, 516 U.S. 400 (1996); *Consolidated Rail Corp v. Gottshall*, 512 U.S. 532 (1994); *Monessen Southwestern R.R. v. Morgan*, 486 U.S. 330 (1988).

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August 24, 2001

Supreme Court, U.S.
FILED
SEP 4 2001
OFFICE OF THE CLERK

No. 01-164

IN THE

Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION,

Petitioner,

v.

JOSEPH P. GRIESSER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Petitioner National Railroad Passenger Corporation ("Amtrak") respectfully submits this brief in reply to respondent's brief in opposition to Amtrak's petition for a writ of certiorari. Pursuant to Rule 15.6, Amtrak will limit this brief to the new points raised by respondent, *i.e.*, his claim that this Court lacks jurisdiction over this matter because: (1) the decision of the Superior Court of Pennsylvania is not a decision of the highest court of that State; and (2) the judgment of the Superior Court is not a final order within the meaning of 28 U.S.C. § 1257. Both of those arguments should be rejected.

THE RELEVANT STATUTE

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of the statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a).

ARGUMENT

THIS COURT HAS JURISDICTION OVER THIS CASE

A. The Court Has Jurisdiction Over The Judgment Of An Intermediate State Appellate Court When The Highest Court Of The State Declines To Review That Judgment

Respondent claims that jurisdiction is lacking because Amtrak has sought certiorari from the decision of the Superior Court of Pennsylvania, which is not the highest court of that State. This argument is totally meritless and the cases cited by respondent to support it — both of which were reviewing

decisions by lower *federal* courts — have literally nothing to do with this issue or § 1257.[1]

After the Superior Court entered its judgment, Amtrak had no automatic right of appeal to the Supreme Court of Pennsylvania. Rather, Amtrak had to seek permission for an appeal by filing a petition of allowance of appeal with the Supreme Court of Pennsylvania. Pa. R. App. P. 1112. Amtrak filed a timely petition, which was denied without comment by the Supreme Court of Pennsylvania. Thus, Amtrak exhausted its appellate opportunities in Pennsylvania.

It is now well-settled that where the highest court of a state declines to exercise its authority to review the decision of an intermediate state court, this Court has jurisdiction over the judgment of the intermediate court. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 678 n.1 (1968); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 159-60 (1954); R. STERN, E. GRESSMAN, S. SHAPIRO, & K. GELLER, SUPREME COURT PRACTICE § 3.12 at 115 (7th ed. 1993) [hereinafter cited as "SUPREME COURT PRACTICE"] ("Should the higher court decline to exercise its authority, the judgment of the intermediate court rather than the order of refusal by the higher court is the judgment reviewable under § 1257.").[2]

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1. *See Pacific States Box & Basket Co. v. White*, 296 U.S. 176 (1935) (affirming *federal* district court's denial of an injunction sought to enjoin enforcement of a Department of Agriculture order concerning proper containers for fruit); *Nutrasweet Co. v. X-L Eng'g Co.*, 227 F.3d 776 (7th Cir. 2000) (affirming judgment entered by *federal* district court in an environmental contamination case).

2. Also meritless is respondent's claim that the petition should have been sought from the Supreme Court of Pennsylvania's order instead of the Superior Court's judgment. "An order of a court of last resort declining to review a case is not ordinarily the judgment which is reviewable under § 1257; in that event, the reviewable judgment is that of the highest court possessing and exercising jurisdiction." SUPREME COURT PRACTICE § 3.13 at 115-16. *See, e.g., Michigan-Wisconsin Pipe Line Co.*, 347 U.S. at 159-60 (where Supreme Court of Texas declined to review decision of Texas Court of Civil Appeals, this Court had jurisdiction over judgment of Court of Civil Appeals and not that of Supreme Court of Texas).

B. The Superior Court's Judgment Qualifies For Review Under § 1257

Respondent claims that the Superior Court's judgment is not a final judgment under § 1257 because it remanded the case for a new trial.[3] Although § 1257 could be read literally to preclude review where anything further remains to be determined by a state court, this Court has never administered the statute in such a mechanical fashion. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975). Recognizing that there are circumstances which require a departure from the requirement of finality, this Court has often "taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Id.* Indeed, "the totality of these exceptions certainly indicates that the Court has been willing to impart to the language 'final judgment or decree' a great deal of flexibility." *Id.* at 506 (Rehnquist, J., dissenting). Decisions subsequent to *Cox* have continued to apply the finality requirement in a flexible manner. *E.g., Duquesne Light Co. v. Barasch*, 488 U.S. 299, 306 (1989) ("[I]n practice, the final judgment rule has not been interpreted so strictly."); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988) (applying a "pragmatic approach" to the question of finality).

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3. Most of the cases cited by respondent do not even come close to supporting this proposition. In fact, most of them do not even involve § 1257 because they are appeals arising from federal rather than state court decisions. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988) (federal trial court's decision on the merits is final for purposes of 28 U.S.C. § 1291 even though amount of attorney's fees due to plaintiff had not been determined); *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980) (per curiam) (federal trial court's decision to order a new trial was not a final, appealable order and could not be reviewed by a writ of mandamus); *Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23 (1966) (federal trial court's decision to deny a summary judgment motion seeking a preliminary injunction was not immediately appealable under 28 U.S.C. § 1292(a)(1)). The only case cited by respondent that deals with § 1257 is *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75 (1997), which is discussed below.

The 1988 amendments to § 1257 allow this Court to take an even more flexible approach to § 1257 than that permitted by *Cox*. Prior to the Supreme Court Case Selection Act, Pub. L. No. 100-352, § 3, 102 Stat. 662 (1988), § 1257 allowed state court decisions to be appealed *as of right* whenever the state court: (1) found a federal statute or treaty invalid; or (2) rejected a federal constitutional or statutory challenge to a state statute. Because these automatic appeals placed a severe burden on the Court's finite time, it is not surprising that some of this Court's § 1257 decisions interpreted § 1257 restrictively in order to cut back on the steady stream of state court cases automatically sent to this Court. That problem has been eliminated by the 1988 amendments, which eliminated all appeals as of right, and now all state court cases come to this Court via the certiorari procedure, thereby giving this Court the opportunity to pick and choose the cases that are worthy of its review.

In any event, under *Cox's* flexible approach to § 1257, this Court should review a state court judgment, even though it remands the case for a new trial, where, as here:

- the federal issue on which certiorari is sought has been finally and conclusively resolved by the state courts
- the federal issue presented is one of considerable importance that affects thousands of other cases pending under the same federal statute;
- this Court has not addressed that federal issue in 38 years
- the state court plaintiff's cause of action arises under a federal statute and does not require this Court (1) to intervene in any state affairs or matters of local concern or (2) to become unnecessarily embroiled in any federal constitutional issues, and
- the underlying judgment of the trial court is clearly a final judgment that has disposed of all claims and issues as to all parties

Cox and its progeny recognize that a state court judgment, even if it contemplates further proceedings in the state courts, qualifies for review under § 1257 if "there is nevertheless sufficient justification for immediate review of the federal question finally determined in the state courts." *Cox*, 420 U.S. at 478-79.[4] That is also the situation here. To begin with, there is no question that the state court here finally determined the question on which certiorari is sought. The Superior Court has conclusively determined that this Court's decision in *Eichel v. New York Central Railroad Co.*, 375 U.S. 253 (1963) (per

4. This case presents a far more compelling case for jurisdiction than *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980), where this Court concluded that it had jurisdiction to review whether a pre-trial motion to amend should be granted. There, a maritime worker filed suit in New York state court for injuries he suffered while working on a ship. The trial court denied his pre-trial motion to amend his complaint to add his spouse as a plaintiff for loss of society because such a claim was not allowed by the controlling federal law. The New York appellate courts disagreed and ruled that federal law allowed the spouse to assert such a claim. Despite the fact that this pre-trial ruling was clearly interlocutory and did not readily fit into any of the exceptions to § 1257 finality enunciated in *Cox*, *id.* at 277, this Court nevertheless exercised jurisdiction over the case. Although the case had been tried and resulted in a verdict for the plaintiff and his spouse *after* certiorari had been granted, the defendant's appeal of the verdict was still pending in state court and thus the case was clearly not final in any sense of the word. Nevertheless, because the federal issue as to the viability of the spouse's claim had been finally decided by the state court, the Court concluded that it made sense to address the question presented rather that send the case back with the issue undecided. *Id.* at 277-79. The same result should obtain here. *See also Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 370 n.11 (1988) (finding jurisdiction under § 1257 over non-final state court judgment because federal question had already been answered by state court and was therefore ripe for review); *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 44 (1977) (per curiam) (finding jurisdiction under § 1257 over non-final state court order denying stay of injunction pending appeal in the state court system because state court order had conclusively answered federal question presented).

curiam) prohibits: (1) a railroad in a FELA action from introducing evidence that a railroad employee is eligible to receive retirement benefits at age 60 in order to rebut a claim that the railroad worker would have worked until age 65 or 70; and (2) a trial court from employing a balancing analysis to determine whether the probative value of such evidence outweighs any prejudicial impact.

To require Amtrak to return to the state courts and try the entire case again and appeal it up the state court system again before it can bring these important federal issues to this Court would be a significant waste of the litigants' and state courts' resources. If Amtrak convinces this Court after a second trip through the state court system that it is right on the *Eichel* issues, then a third trial would be required or the results of the first trial would be reinstated. Either way the second trial and resulting series of state court appeals would be a complete waste of time. This Court has always tried to avoid such an inefficient process when interpreting § 1257. *See, e.g., Mills v. Alabama*, 384 U.S. 214, 217-18 (1966).

Moreover, a "refusal immediately to review the state court decision might seriously erode federal policy." *Cox*, 420 U.S. at 483. The federal policy implicated here is that damages awarded under the FELA should be "realistic" given the unique burden that the statute places upon the railroad industry. *See Norfolk & Western R.R. Co. v. Liepelt*, 444 U.S. 490, 493 (1980). Thousands of FELA lawsuits are filed every year, Petition at 9 n.4, and in many of those cases there is an issue as to the proper period of time for which future lost wages should be awarded. In this one case alone, the difference between retirement at age 60 and 70 amounts to almost $300,000. *See* Petition at 20 n.16. Multiplying that figure by the thousands of FELA cases filed every year easily demonstrates that this issue is worth millions of dollars every year to the railroad industry.[5]

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5. The impact on federal railroad policy seems just as significant as that found in *Goodyear Atomic Corp.*, 486 U.S. at 178-80. There, (Cont'd)

In *Cox*, this Court decided to review the First Amendment issues presented by a state court ruling that allowed a civil action by a father to proceed to trial against a reporter and television station for broadcasting a report about the rape of his daughter that mentioned her name. This Court did not believe the press should have to operate in the shadow of a state court ruling that allowed such a trial to go forward over First Amendment objections. 420 U.S. at 485-86. The same can be said here. The railroad industry should not have to litigate thousands of FELA cases every year under the shadow of the ruling by the Superior Court and other courts that FELA defendants are prohibited from introducing highly relevant evidence needed to rebut exaggerated and unrealistic claims for future lost wages. The federal and state trial courts confronting these issues are also entitled, after 38 years, to a determination by this Court on whether *Eichel* does in fact prohibit them from employing any balancing analysis in deciding whether to admit such evidence. This is particularly true given that, as even the court below admitted, *Eichel* does not directly address the issue raised in this case.[6]

(Cont'd)
the Court took jurisdiction over an interlocutory state court order allowing an injured worker's claim for additional workers' compensation benefit due to safety violations at a nuclear facility because the state court decision — if left unreviewed — might seriously erode federal policy in the area of nuclear production.

6. The importance of the FELA as a federal statute has been recognized by this Court in deciding issues under § 1257. In *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379 (1953), this Court held that it had jurisdiction over a state court judgment that had overruled a demurrer to a complaint seeking to enjoin a FELA action filed in another state. The unsuccessful demurrer had argued that the injunction sought was barred by a provision of the FELA that allowed a FELA plaintiff to file suit wherever the railroad was doing business. Even though the state court ruling was clearly not final, *id.* at 382, this Court took jurisdiction over the case, noting that the state court "had interpreted an important federal statute." *Id.* at 381. *See also Burlington Northern*
(Cont'd)

Moreover, declining jurisdiction in this case would not further the purpose of the finality requirement of § 1257, namely "limit review of state court determinations of federal *constitutional* issues to leave at a minimum federal intrusion in *state affairs*." *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973) (emphasis added). *See also Republic National Gas Co. v. Oklahoma*, 334 U.S. 62, 67 (1998) ("This prerequisite for the exercise of the appellate powers of the Court is especially pertinent when a *constitutional* barrier is asserted against a state court's decision on *matters peculiarly of local concern*.") (emphasis added)

In this case, the Court would not be intruding into "state affairs." The question at hand concerns the scope of the FELA, a *federal* statute, which requires state courts to interpret and apply federal law, and thus it does not concern "matters peculiarly of local concern." Nor does this case present any constitutional question, and thus there is no reason to hesitate taking the case because of this Court's obligation to avoid constitutional questions unless absolutely necessary.[7] Thus, while it may be more appropriate to apply the § 1257 exceptions more strictly when state claims or constitutional issues are present, no such impediment is present here, where only a federal statute is at issue.

It also bears emphasis that the trial court's judgment in this case was unquestionably a final judgment under both federal and state law. The case was tried to a verdict and all post-trial motions were denied. There was nothing else for the trial court

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(Cont'd)

R.R. Co. v. Ford, 504 U.S. 648, 650 n* (1992) (finding jurisdiction under § 1257 where state trial court denied FELA defendant's pre-trial motion to change venue).

7. *See, e.g., Clinton v. Jones*, 520 U.S. 681, 690 & n.11 (1997); *Cox*, 420 U.S. at 509-10 (Rehnquist, J., dissenting); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

to do.[8] This critical fact distinguishes this case from other decisions of this Court that have declined jurisdiction because of the absence of a final judgment. In those cases, the trial court's order was clearly interlocutory and thus this Court would have had to intervene in on-going proceedings in a state trial court.[9] Indeed, in this sense, the judgment in this case is more worthy of review than other cases where this

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8. It is also significant that the Superior Court's judgment remanding for a new trial is considered to be a final order under Pennsylvania law. Only a "final order" of the Superior Court can be the subject of a petition for allowance of appeal to the Supreme Court of Pennsylvania. Pa. R. App. P. 1112(a). "A final order of the Superior Court . . . is any order that concludes an appeal, including an order that remands an appeal, in whole or in part, unless the appellate court remands and retain jurisdiction." Pa. R. App. P. 1112(b). In this case, the Superior Court did not retain jurisdiction. *See* 16a. Although not dispositive as to whether the Superior Court's judgment is final for purposes of § 1257, the fact that Pennsylvania considers that judgment to be a final order is a factor for the Court to consider. *See* SUPREME COURT PRACTICE § 3.3 at 93 ("The most pertinent source of inquiry as to finality, outside the judgment, opinion and order is the law of the state wherein the judgment was rendered.").

9. For example, in *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), an Alabama trial court in a civil rights case denied a pre-trial motion by a city seeking a ruling that compensatory damages could not be awarded against it under 42 U.S.C. § 1983. It certified this interlocutory question to the Alabama Supreme Court, which reversed and held that only punitive damages could be awarded and remanded for further proceedings, including a trial on liability and damages for the § 1983 and state law claim plaintiff had filed. This Court declined to review this decision because it was "avowedly interlocutory" and "answered a single certified question that affected only two of the four counts in petitioners' complaint." 522 U.S. at 81. Thus, *Jefferson* was in a completely different procedural position than the case at bar. *See also Florida v. Thomas*, 121 S. Ct. 1905, (2001) (trial court granted motion to suppress evidence; defendant had yet to be tried).

Court has found finality under § 1257 since the trial court's order in those cases was also clearly interlocutory.[10]

CONCLUSION

For the reasons stated above, this Court has jurisdiction over this case and the petition for a writ of certiorari should be granted.

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10. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 53-56 (1989) (trial court granted pre-trial motion to dismiss two of eight charges; defendant had yet to be tried); *Southland Corp. v. Keating*, 465 U.S. 1, 6-7 (1984) (trial court denied defendant's motion to arbitrate state statutory claims); *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 642 n.3 (1976) (trial court denied defendant's pre-trial motion to challenge venue); *Cox*, 420 U.S. at 1035-36 (trial court granted summary judgment on liability but damages still had to tried by jury).